CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 30 **AUGUST 28, 1996** **NO. 35**

This issue contains:

U.S. Customs Service
General Notice
U.S. Court of Appeals for the Federal Circuit
Appeal No. 93–1313, 93–1114, 93–1544, 93–1496, 94–1112, 95–1026, 95–1363, 95–1099, 95–1111, 95–1139, and 96–1116

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 7–1996)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of July 1996 follow. The last notice was published in the CUSTOMS BULLETIN on July 24, 1996.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: August 9, 1996.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

08/02/96 U.S. CUSTOMS SERVICE PAGE 1
08:01:30 IPR RECORDATIONS ADDED IN JULY 1996 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9600187	19960709	20160709	THE LOVING FAMILY COLLECTION	CARLISLE JEWELRY COMPANY INC	N
COP9600188	19960709	20160709	CRAZY CRITTER #3	TANG LUNG DEVELOPMENT	N
COP9600189	19960709	20160709	MANIX DESIGN 941 PMS (2) MANIX DESIGN 942 PMS	MANIX CLOCK INC	N
COP9600190	19960709	20160709	MANIX DESIGN 945 PMS (4) MANIX DESIGN 946 PMS	MANIX CLOCK INC	N
COP9600191	19960715	20160708	FISHER-PRICE ACTIVITY LINKS GYM	FISHER-PRICE INC	N
COP9600192	19960715	20160708	FISHER-PRICE ACTIVITY LINKS GYM	FISHER-PRICE INC	N
COP9600193	19960715	20160703	BASE CODE, AHA-2940/2940W NO AUTO TERM, VL.2 CS=1000	ADAPTEC INC	N
COP9600194	19960715	20160708	THE HUNCHBACK OF NOTRE DAME	WALT DISNEY COMPANY	N
COP9600195	19960724	20160724	WARIO'S WOOD (SUPER NES VERSION)	NINTENDO OF AMERICA INC.	N
COP9600196	19960724	20160724	CRAZY CRITTER #3	TANG DEVELOPMENT LTD.	N
COP9600197	19960724	20160724	BASE CODE, AHA-2940/40W 589135 REV A	ADAPTEC INC.	N
COP9600198	19960724	20160724	BASE CODE, AHA-2940/J95 CS=9700 955401-00JA REV.A	ADAPTEC INC.	N
COP9600199	19960724	20160724	BASE CODE, AHA-1030P H CS=F20E 907407-00 REV A	ADAPTEC INC.	N
COP9600200	19960724	20160724	BASE CODE, AHA-1030P L CS=A1F2 907406-00 REV A	ADAPTEC INC.	N
COP9600201	19960724	20160724	BASE CODE, AHA-2940N/JA BIOS CS=9600 589110-00JA REV.A	ADAPTEC INC.	N
COP9600202	19960724	20160724	BASE CODE, AHA-3940/40W 916903-00 REV A	ADAPTEC INC.	N
COP9600203	19960731	20160731	CRAVAT 4T404T	TUNDRA KNITWEAR INC.	N
COP9600204	19960731	20160731	VOYAGER 2T801T	TUNDRA KNITWEAR INC.	N
COP9600205	19960731	20160731	PETITE PLIE MEDIUM-SIZED GIFT BAG	SANRIO COMPANY	N
COP9600206	19960731	20160731	KOBUTA NO PIPPO	SANRIO COMPANY	N
COP9600207	19960731	20160731	BRENTWOOD	CONGOLEUM CORPORATION	N
SUBTOTAL RECORDATION TYPE			21		
TMK9600459	19960708	20020921	GANT	PHILLIPS-VAN HEUSEN CORPORATION	Y
TMK9600460	19960708	20050117	GANT	PHILLIPS-VAN HEUSEN CORPORATION	Y
TMK9600461	19960712	20050912	BABY BOP DINOSAUR CONFIGURATION	LYONS GROUP	N
TMK9600462	19960712	20050928	BJ DINOSAUR CONFIGURATION	LYONS GROUP	N
TMK9600463	19960712	20050926	BARNEY DINOSAUR RECTANGULAR DESIGN WITH STAR	LYONS GROUP	N
TMK9600464	19960712	20060423	KNOWLEDGE ADVENTURE LOGO (DESIGN OF A MAN)	KNOWLEDGE ADVENTURE INC	N
TMK9600466	19960712	20060409	K MEDIC (STYLIZED LETTER)	K-MEDIC INC.	Y
TMK9600467	19960712	19991226	PRECISION	PRECISON TRADING CORP.	Y
TMK9600468	19960712	19981121	JOSE BENITO	MANUFACTURA DE TABACOS (MATASA)	N
TMK9600469	19960712	20041220	DESIGN OF A HEAD COVER FOR GOLF CLUBS	PRINCIPLE PLASTICS INC	Y
TMK9600470	19960712	20050704	PLAY STATION	SONY CORPORATION	N
TMK9600471	19960715	20050704	PLAY STATION	SONY CORP	N
TMK9600472	19960724	20020428	FERRAGAMO & BUCKLE DESIGN	SALVATORE FERRAGAMO ITALLA S.P.A	N
TMK9600473	19960724	20050604	FERRAGAMO (STYLIZED)	SALVATORE FERRAGAMO ITALLA S.P.A	N
TMK9600474	19960724	20080123	IZOD THE CHOICE OF CHAMPIONS	PHILLIPS-VAN HEUSEN CORPORATION	Y
TMK9600475	19960724	20031207	IZOD CLUB	PHILLIPS-VAN HEUSEN CORPORATION	Y
TMK9600476	19960724	20071212	IZOD	PHILLIPS-VAN HEUSEN CORPORATION	Y
TMK9600477	19960724	20041225	IZOD	PHILLIPS-VAN HEUSEN CORPORATION	Y
TMK9600478	19960724	20060528	UNITED STATES SOCCER FEDERATION & DESIGN	UNITED STATES SOCCER FEDERATION	N
TMK9600479	19960725	20060528	U.S. SOCCER	UNITED STATES SOCCER FEDERATION	N
TMK9600480	19960725	20001113	MIXING VALVE DESIGN	MOEN INCORPORATED	N
TMK9600481	19960725	20051003	NATURAL KEYBOARD	MICROSOFT CORPORATION	N
TMK9600482	19960725	20080209	POWERPOINT	MICROSOFT CORPORATION	N
TMK9600483	19960725	20011022	MICROSOFT PRESS	MICROSOFT CORPORATION	N
TMK9600484	19960725	20010924	MICROSOFT PRESS & DESIGN	MICROSOFT CORPORATION	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9600485	19960725	20041122	ENCARTA	MICROSOFT CORPORATION	N
TMK9600486	19960725	20040122	ENCARTA	MICROSOFT CORPORATION	N
TMK9600487	19960725	20050117	ENCARTA	MICROSOFT CORPORATION	N
TMK9600488	19960725	20020929	AUTOMAP	MICROSOFT CORPORATION	N
TMK9600489	19960725	20021006	WAVE DESIGN	FISHER-PRICE, INC.	N
TMK9600490	19960725	20060423	L.W. PACKARD	L.W. PACKARD & COMPANY INC.	N
TMK9600491	19960725	19990527	ATHLETIC TRAINING SUITS DESIGN	ADIDAS AG MERGER	N
TMK9600492	19960725	20040111	ADIDAS CONFIGURATION OF A TENNIS SHOE	ADIDAS AG	N
TMK9600493	19960725	20020204	THE BRAND WITH THE THREE STRIPES	ADIDAS AG	N
TMK9600494	19960725	20060102	ADIDAS DESIGN	ADIDAS AG	N
TMK9600495	19960725	20051031	ADIDAS EQUIPMENT & DESIGN	ADIDAS AG MERGER	N
TMK9600496	19960725	20031004	ADIDAS & DESIGN	ADIDAS AG MERGER	N
TMK9600497	19960725	20041016	ADIDAS	ADIDAS AG MERGER	N
TMK9600498	19960725	20041218	MISCELLANEOUS DESIGN	ADIDAS AG MERGER	N
TMK9600499	19960725	20021012	Y SHAPED DESIGN OF A SPORT BALL	ADIDAS SARRAGAN FRANCE	N
TMK9600500	19960725	20040503	ADIDAS TENNIS SHOE DESIGN	ADIDAS AG	N
TMK9600501	19960725	20090530	ROSE'S & DESIGN	ROSE & COMPANY LTD.	N
TMK9600502	19960725	20030720	ROSE'S	ROSE & COMPANY LTD.	N
TMK9600503	19960725	20051203	AIRCONDEX	AIRCONDEX INC.	N
TMK9600504	19960726	20090124	OAKLEY	OAKLEY INC.	N
TMK9600505	19960726	20031109	NOVA	CKA GROUP INC.	Y
TMK9600506	19960726	20051107	XS EXCESS PACO RABANNE (STYLIZED)	PACO RABANNE PARFUMS S.A.	N
TMK9600507	19960726	20050110	SANTA'S MAGIC TREE RIDE	AUTOPLAX CORPORATION	Y
TMK9600508	19960726	20040717	VERNORS	A & W CONCENTRATE COMPANY	N
TMK9600509	19960726	20081018	A&W & DESIGN	A & W CONCENTRATE COMPANY	N
TMK9600510	19960726	20010608	SCHWEPPES	SCHWEPPES INTERNATIONAL LTD.	N
TMK9600511	19960726	20040802	SCHWEPPES & DESIGN	SCHWEPPES INTERNATIONAL LTD.	N
TMK9600512	19960726	20040108	THE ORIGINAL PETER RABBIT BOOK	FREDERICK WARNE & COMPANY INC.	N
TMK9600513	19960726	20030922	RUNNING RABBIT DESIGN	FREDERICK WARNE & COMPANY INC.	N
TMK9600514	19960726	20020128	INTERVOX	INTERNATIONAL COMPONENTS CORP.	N
TMK9600515	19960726	20050316	D WITHIN A SQUARE	SQUARE D COMPANY	N
TMK9600516	19960726	20010106	SQUARE D	SQUARE D COMPANY	N
TMK9600517	19960726	20001206	D WITHIN A SQUARE	SQUARE D COMPANY	N
TMK9600518	19960726	20050119	D WITHIN A SQUARE	SQUARE D COMPANY	N
TMK9600519	19960726	20060306	NICHOLSON	COOPER INDUSTRIES INC.	N
TMK9600520	19960726	20050129	BLOW POP	CHARMS COMPANY	N
TMK9600521	19960726	20070414	CONFIGURATION OF A VACUUM CLEANER	REXAIR INC.	N
TMK9600522	19960726	20000404	ONE A DAY	BAYER CORPORATION	N
TMK9600523	19960726	19960911	ONE A DAY	BAYER CORPORATION	N
TMK9600524	19960726	20070110	ONE A DAY BRAND MULTI VITAMINS & DESIGN	BAYER CORPORATION	N
TMK9600525	19960726	19961230	TECHNICON	BAYER CORPORATION	N
TMK9600526	19960726	19991219	GULUCOFILM	BAYER CORPORATION	N
TMK9600527	19960726	20021121	MULTISTIX	BAYER CORPORATION	N
TMK9600528	19960726	20010721	GLUCOSTIX	BAYER CORPORATION	N
TMK9600529	19960726	20020114	HIRES	CADBURY BEVERAGES B.V.	N
TMK9600530	19960726	20080621	HIRES AND DESIGN	CADBURY BEVERAGES B.V.	N
TMK9600531	19960726	20050711	SUN-DROP & DESIGN	CADBURY BEVERAGES B.V.	N
TMK9600532	19960726	20011126	SUN-DROP	CADBURY BEVERAGES B.V.	N
TMK9600533	19960726	20040514	CANADA DRY AND DESIGN	CADBURY BEVERAGES INC.	N

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08:01:30 IPR RECORDATIONS ADDED IN JULY 1996 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9600534	19960726	20090802	CANADA DRY	CADBURY BEVERAGES INC.	N
TMK9600535	19960730	20060525	TORX IN DESIGN	TEXTRON INC.	N
TMK9600536	19960731	20050926	KELEK AND DESIGN	KELEK S.A.	N
TMK9600537	19960731	20060702	IZZY AND DESIGN	ATLANTA COMMITTEE FOR THE OLYMPI	Y
TMK9600538	19960731	20010912	PENAFIEL	CADBURY BEVERAGES B.V.	N
TMK9600539	19960731	20001115	PERMAFRESH	SEQUA CHEMICALS INC.	N
TMK9600540	19960731	20020417	PERMAFRESH	SEQUA CHEMICALS INC.	N
TMK9600541	19960731	20050530	REACTOPAQUE	SEQUA CHEMICALS INC.	N
TMK9600542	19960731	20081115	SEQUALINK	SEQUA CHEMICALS INC.	N
TMK9600543	19960731	20000508	SEQUASOFT	SEQUA CHEMICALS INC.	N
TMK9600544	19960731	20081025	SEQUAPEL	SEQUA CHEMICALS INC.	N
TMK9600545	19960731	20000410	SEQUABOND	SEQUA CHEMICALS INC.	N
TMK9600546	19960731	20060206	SEQUAREZ	SEQUA CHEMICALS INC.	N
TMK9600547	19960731	20001013	SUNSIZE	SEQUA CHEMICALS INC.	N
TMK9600548	19960731	20001013	SUNREZ	SEQUA CHEMICALS INC.	N
TMK9600549	19960731	20020309	DUSTBUSTER	PATRICK MASTRONARDO	Y
TMK9600550	19960731	20010302	GUY LAROCHE	GUY LAROCHE SARL	N
TMK9600551	19960731	20011231	CONFIGURATION OF A PAINT SPRAY GUN	FEDERAL EQUIPMENT CORPORATION	N

SUBTOTAL RECORDATION TYPE 92

TOTAL RECORDATIONS ADDED THIS MONTH 113

PROPOSED COLLECTION; COMMENT REQUEST

COMMERCIAL INVOICES

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Commercial Invoices. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before October 15, 1996, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW., Washington, DC 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION: The newly proposed International Trade Data System (ITDS) is being designed to integrate the different government trade and transportation data collection processes to provide a standard means of gathering, processing, storing, and disseminating import and export trade data. Agencies would share data as needed to support their individual agency mission while maintaining agency specific information in their own files. As envisioned, the system would provide for the electronic exchange of declarations, foreign and domestic issued licences and other documents required of trading parties based on commercial data. For example, it would allow for interagency notice of licensing and permitting decisions, and accommodate the decrementing of licenses, while allowing control of the license and permit issuing processes to be maintained by responsible agencies. To accommodate a constantly changing economic and geopolitical world, the system would be designed for flexibility and easy modification, so that new trade laws and regulations requirements would be more easily incorporated into the integrated data system. A very important part of the ITDS would be to provide a convenient entry point for business to provide international trade data to all agencies needing to be involved in a transaction. Importers and exporters would only have to provide the information once and it would be routed among the appropriate agencies. As an example: importers would not have to file identical information on a CF 7501 Form with Customs, an FDA Form 701 with

FDA, an HS7 Form with the Department of Transportation or an EPA 35201 Form with the Environmental Protection Agency. Names, addresses, descriptions, classifications, serial numbers would have to be provided only once and the information would be provided to all appropriate agencies. The data system would also standardize trade and transportation data for both imports and exports based on the information normally established among trading partners in the customary conduct of business. Such elements as commercial descriptions and quantifies, names and addresses of parties to shipments, and departure and arrival locations, all of which are part of normal commercial information would be defined so that they mean the same thing to all users.

Standard definitions of terms, standard codes and abbreviations for countries, goods and conveyance modes and shipment identifiers would simplify procedures and help streamline processes. The system would use a recognized standard, such as United Nations/Electronic Data Interface for Administration, Commerce, and Transportation (UN/EDIFACT).

Those additional data elements necessary for monitoring specific goods would be added to the commercial level record of the ITDS and made available to the applicable agency or agencies. By standardizing the data collected and by eliminating duplicate data, agencies would be able to integrate many of their present systems for selecting and targeting potentially violative shipments and thus provide more efficient and enforcement of trade statutes and regulations. Improved analysis of trade and transportation flow and trends would also enhance trade promotion activities and provide a better basis for establishing and negotiating international trade policy. Aggregate level trade data would be available established distribution channels to U.S. businesses and the general public.

The trade promotion component of the ITDS would provide information on both exporting and importing to the international trade community. By using the Department of Commerce's National Trade Data Bank, the system would provide user friendly electronic access to basic export and import information, market research reports, overseas contacts, duty rates, and information on international financial assistance. Reference materials such as U.S. Export Regulations, Customs Regulations, and an International Trade Terms Directory would be available online. A guide to U.S. agencies involved in international trade would also be available. Access to U.S. contacts at the Federal, State, and local levels including names, phone and fax numbers, and E-mail address would be in the system. Most importantly, the public portions of the system would be readily available to the general public through the Internet, and from kiosks in world Trade Centers, Federal Building's, public libraries, and Customs Houses around the country.

Proof of concept for the ITDS will be the North American Trade Prototype, a cargo and conveyance processing system being developed

jointly by Canada, Mexico and the United States under the auspices of the Heads of customs Conference. Article 512 of NAFTA, entitled "Cooperation", states that to the extent possible the three Parties shall cooperate, for the purpose of facilitation of the flow of trade, the harmonization of documentation, standardization of data elements, the acceptance of an international data syntax, and the exchange of information. This North American Trade Automation Prototype (NATAP) will allow the Customs, Transportation, and Immigration Services, and other participating government agencies of all three countries to experiment with advanced processing and documentation systems and incorporate new techniques to facilitate and regulate the flow of trade among the three countries. NATAP is based on commercial, transaction-level information for all shipments, standard data elements and definitions, pre-arrival processing. Radio Frequency Identification Devices on conveyances to provide advance notice of arrival, paperless transactions, and UN/EDIFACT communication protocol.

NATAP itself will be a low volume test of new concepts with a limited number of participants, operating at six sites. The sites are: Buffalo/ Fort Erie, Detroit/Windsor, Laredo/Nuevo Laredo, El Paso/Ciudad, Otay Mesa/Tijuana, and Nogales/Nogales. It will operate in parallel with current systems. Participants in the Prototype must continue to meet all current requirements. NATAP will allow the three Custom administrations to step outside existing systems and experiment with new procedures and technologies to realize the goals and vision of NAFTA. Although NATAP will be limited in scope, the concepts that will be tested are a reflection of the full scale data system envisioned.

NATAP will encompass the transportation and commercial data for export and import processes in the land border environment. The extent to which each government extends the functionality of the Prototype for testing other agency requirements or to experiment with national risk assessment or selectivity processing system will be determined by each Customs authority. NATAP will be tested and evaluated at the above mentioned sites beginning in September, 1996 and is expected to run through March, 1997.

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address using commercial documents as the basis for processing the port clearance of international trade transactions at the border; the accuracy of the burden estimates in terms of reporting and record keeping and capitalization costs, if any; and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection.

The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB)

approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Commercial invoices.

OMB Number: 1515–0120.

Form Number: N/A.

Abstract: The collection of Commercial Invoices is necessary for the proper assessment of Customs duties. The information which is supplied by the foreign shipper is used to assure compliance with statues and regulations.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 350,000.

Estimated Time Per Respondent: 10 seconds.

Estimated Total Annual Burden Hours: 84,000.

Estimated Total Annualized Cost on the Public: $1,201,200.00.

Dated: August 9, 1996.

V. CAROL BARR,
Printing and Records Services Group.

[Published in the Federal Register, August 14, 1996, (61 FR 42312)]

U.S. Court of Appeals for the Federal Circuit

KOYO SEIKO CO., LTD., AND KOYO CORP. OF U.S.A, PLAINTIFFS-APPELLANTS *v.* UNITED STATES AND DEPARTMENT OF COMMERCE, DEFENDANTS-APPELLEES, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANTS-APPELLEES

Appeal No. 96-1116

(Decided August 12, 1996)

Neil R. Ellis, Powell, Goldstein, Frazer & Murphy, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief were *Peter O. Suchman, Susan M. Mathews,* and *Lee Ann Alexander.*

Velta A. Melnbrencis, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C., argued for defendants-appellees The United States and Department of Commerce. With her on the brief were *Frank W. Hunger,* Assistant Attorney General, and *David M. Cohen,* Director. Also on the brief were *Stephen J. Powell,* Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C., *Berniece A. Browne,* Senior Counsel, and *Mark A. Barnett* and *Dean A. Pinkert,* Attorney-Advisors.

James R. Cannon, Jr., Stewart and Stewart, of Washington, D.C., argued for defendants-appellees The Torrington Company and Federal-Mogul Corporation. With him on the brief were *Terence P. Stewart, William A. Fennell,* and *Timothy C. Brightbill.*

Appealed from: United States Court of International Trade. *Judge* TSOUCALAS.

Before ARCHER, *Chief Judge,* NEWMAN and LOURIE, *Circuit Judges.*

NEWMAN, *Circuit Judge.*

Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., Inc. (together "Koyo") appeal two aspects of the judgment of the Court of International Trade[1] sustaining the Final Results of the Department of Commerce, International Trade Administration (Commerce or ITA) second administrative review of the antidumping duty order on certain antifriction roller bearings from Japan. The Court of International Trade sustained Commerce's use of the "best information available" (BIA) rule to calculate the dumping margin for a certain class of bearings; we

[1] *Koyo Seiko Co. v. United States,* No. 92-07-00505, 1995 WL 495973 (Ct. Int'l Trade Aug. 16, 1995).

affirm that decision. However, on the issue of the doubtful debt reserve it was incorrect to treat this accounting procedure differently when calculating home market selling expenses and United States selling expenses. This aspect of the court's decision is reversed.

DISCUSSION

The antidumping law provides that when Commerce determines that a class or kind of foreign merchandise is being sold in the United States at less than fair value, and the International Trade Commission determines that a United States industry is materially injured or threatened with material injury by imports of that merchandise, Commerce must publish an antidumping duty order and the Customs Service must assess an antidumping duty equal to the difference between the foreign market value and the United States price. 19 U.S.C. §§ 1673d and 1673e.[2] Commerce must, upon request, periodically review and redetermine the antidumping duty. 19 U.S.C. § 1675(a).

On May 15, 1989, Commerce published antidumping duty orders for certain antifriction roller bearings from Japan. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof from Japan,* 54 Fed. Reg. 20,904 (Dep't. Comm. 1989). This appeal relates to the second administrative review, *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom,* 57 Fed. Reg. 28,360 (Dep't. Comm. 1992) (final results of antidumping duty administrative reviews), amended, 57 Fed. Reg. 59,080 (Dep't. Comm. 1992). Koyo appealed certain aspects of the review results to the Court of International Trade. The court sustained Commerce's determinations, and this appeal followed.

The Court of International Trade must sustain any determination, finding or conclusion found by Commerce on review of determinations on the record unless it it unsupported by substantial evidence or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Zenith Elec. Corp. v. United States,* 77 F.3d 426, 430 (Fed. Cir. 1996) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). We review a decision of the Court of International Trade to decide, applying the statutory standard, whether Commerce's determinations should be sustained. *NEC Home Elec., Ltd. v. United States,* 54 F.3d 736, 742 (Fed. Cir. 1995). Thus we review the findings and conclusions of the agency for evidentiary support and for compliance with law. *Id.*

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[2] Effective January 1, 1995, the Uruguay Round Amendments Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809, amended the antidumping law in a number of respects. The URAA does not apply to administrative reviews initiated before January 1, 1995. Citations are to the antidumping law before these amendments.

I

THE BEST INFORMATION AVAILABLE

Koyo states that Commerce unlawfully applied its BIA rule in calculating the dumping margin for one model of antifriction bearings. Use of the BIA, when actual data are not available, is authorized in 19 U.S.C. § 1677e(c):

> In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

See Rhone-Poulenc, Inc. v. United States, 899 F.2d 1185, 1190–91 (Fed. Cir. 1990) (the burden of production is fairly placed on the importer).

A

Koyo correctly states that unless the requisite information has been fairly requested, it is inappropriate to take recourse to secondary evidence such as the best information that can be gleaned from other sources. *See Olympic Adhesives, Inc. v. United States,* 899 F.2d 1565, 1572–75 (Fed. Cir. 1990) (the BIA rule can not be used for data not requested). Koyo states that Commerce never requested cost data for the bearings here at issue.

Koyo points to certain apparently conflicting instructions, and fairly extensive correspondence and negotiations. However, it is sufficiently clear that Commerce requested from Koyo cost data for all bearings that continued to be subject to the antidumping duty order after use to make finished products in the United States. Koyo appears to have understood what was needed, for in a December 23, 1991 letter to Commerce Koyo stated:

> Koyo's situation regarding these sales in the United States is very complex. Indeed, our response to the request for information in the questionnaire regarding these sales has been delayed because of this complexity, as well as the difficulty in obtaining resale information regarding the non-scope merchandise from U.S. companies whose relationships with Koyo are extremely tenuous.

Koyo eventually stated that it was unable to obtain this resale information from a United States affiliated company. Although Koyo continues to argue that it was not asked to provide the particular information here at issue, there is substantial evidence supporting the contrary finding by Commerce. When Koyo failed to supply the requested data for its affiliated company, Commerce was required to use the best information available.

B

Koyo also contends that even if Commerce were found to have requested the data for these bearings, Commerce improperly and

unfairly applied the BIA rule. According to Koyo, Commerce applied the "Roller Chain rule" too rigidly, thus preventing these bearings from being excluded from the antidumping duty order. The so-called Roller Chain rule is a *de minimis* exception to the requirement that dumping margins be computed for all United States imports at less than fair value. The rule is named for the ruling that implemented congressional intent that an antidumping duty be assessed only when significant amounts of imported merchandise are used in further manufacture or assembly before sale to unrelated purchasers. *See Roller Chain, Other Than Bicycle, From Japan,* 48 Fed. Reg. 51,801 (Dep't. Comm. 1983) (the entered value of the imported merchandise must be a significant part of the sales value of the finished merchandise in order to incur antidumping duty); H.R. Rep. 571, 93d Cong., 2d Sess. 70 (1973) (expressing congressional intent).

The Roller Chain rule applies only to imported goods that are not resold as imported but are incorporated into finished products in the United States, and the first sale to an unrelated person is of the finished product. To be excluded from the antidumping duty order, the entered value of the merchandise must be an insignificant portion of the value of the finished product when sold to unrelated customers in the United States. Commerce established a one percent threshold for determining significance. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany et al.,* 54 Fed. Reg. 18992, 19090 (Dep't. Comm. 1989).

Commerce applied the one percent threshold in the first antifriction bearing administrative review, although it had initially proposed (but not used) a five percent threshold for the proceeding. Considerable deference is due to Commerce's reasonable statutory interpretation and its application. *See Zenith Elec.,* 77 F.3d at 430 (Commerce was assigned broad discretionary authority in administering the antidumping statutes). With appropriate deference to the discretionary authority of the agency charged with administering the statute, the choice of the one percent figure is not unreasonable.

The bearings at issue comprise slightly more than one percent of the sales value of the finished product. Although Koyo argues that these bearings should be excluded from antidumping duty because they only slightly exceed the one percent threshold, Commerce did not abuse its discretion in applying its rule rigorously.

C

Koyo also argues that Commerce did not reasonably apply the statutory definition of "exporter," as used in 19 U.S.C. § 1677a(e)(3), in requiring that Koyo obtain cost data from a United States affiliate "for whose account the merchandise is imported." Commerce applied the definition of "exporter" in 19 U.S.C. § 1677(13)(D):

> **(13) Exporter.**—[the term includes]—
>
> (D) any person or persons [who] own or control in the aggregate 20 percent of more of the voting power or control in the business

> carried on by the person for whom or for whose account the merchandise is imported into the United States, and also 20 percent or more of such power or control in the business of the exporter, manufacturer, or producer.

Commerce determined, and it is not disputed, that this Koyo affiliate met this criterion. Koyo states that is relationship with this importing affiliate is too distant for Koyo to have the leverage needed to obtain the cost data required by 19 U.S.C. § 1677a. However, the manufacturer of the finished product is in the best position to supply the information needed by Commerce in determining the relative value of the dumped component in the finished product. *See Zenith Elec. Corp. v. United States,* 988 F.2d 1573, 1583 (Fed. Cir. 1993). The burden of production is appropriately placed on the party deemed to control the information. Because Koyo's affiliated company came within the 20% ownership or control test, Commerce reasonably looked to Koyo to supply the date. This was neither an abuse of discretion, nor a violation of law. When Commerce did not receive the needed data it lawfully applied the BIA rule, as authorized by 19 U.S.C. § 1677e(c).

D

Koyo argues that the BIA rate used by Commerce was unnecessarily high, thus punishing Koyo for its inability to obtain the requested data. Commerce applied a 73.55% dumping margin based on the best information available. Koyo states that a lower, weighted average margin was calculated during the review.

Commerce applied its two-tier methodology for determining and applying the BIA rule. For importers that refuse to cooperate with the agency's investigation Commerce uses the first-tier rate, which is the highest dumping margin calculated for any party in the less than fair value (LTFV) investigation of the merchandise, or calculated in any administrative review. The second-tier rate is used when an importer cooperates but nonetheless fails to provide requested information. The second-tier rate is the higher of (1) the LTFV rate for the merchandise or (2) the highest calculated dumping margin during the review at issue for the same class or kind of merchandise from the same country. Here, Commerce applied the second-tier rate of 73.55% because while Koyo cooperated with the agency, Koyo's LTFV rate was higher than the dumping margin calculated in the review. This two-tier system has been sustained as "a reasonable and permissible exercise of the ITA's statutory authority to use the best information available when a respondent refuses or is unable to provide requested information." *Allied-Signal Aerospace Co. v. United States,* 996 F.2d 1185, 1192 (Fed. Cir. 1993). Commerce's imposition of the second-tier BIA rate met these criteria.

The Court of International Trade's decision sustaining the application of the BIA rule, and the imposition of antidumping duty at the rate of 73.55%, is affirmed.

II

THE DOUBTFUL DEBT RESERVE

Commerce did not allow Koyo's doubtful debt reserve as a home market indirect selling expense, *see* 19 C.F.R. § 353.56(b) (offset of indirect selling expense to exporter's sales price), on the ground that is was not actual bad debt but simply a reserve account. Koyo challenges this decision, arguing that if the doubtful debt account is not allowed as a home market indirect selling expense, the analogous reserve must be excluded from the United States indirect selling expense in order to achieve the requisite fair comparison of home market and United States prices. The Court of International Trade, sustained Commerce's treatment of the home market doubtful debt reserve, without commenting on Koyo's argument that Commerce failed to treat the two markets in a consistent manner.

The government and The Torrington Company state that Koyo did not adequately raise these arguments administratively. However, Koyo plainly and vigorously raised with Commerce its objection to the exclusion of its doubtful debt reserve in calculating home market selling expenses, and argued that these identical accounts in both markets should be given the same accounting treatment. Koyo's answers to the ITA questionnaire placed on the record the doubtful debt allowances for the home and United States markets. Although Koyo's challenge was directed to Commerce's removal of the reserve from home market selling expenses, Koyo's argument was based on Commerce's continued deduction of this reserve in calculating the United States sales value.

Commerce bears the obligation to make a "fair value comparison on a fair basis." *Smith-Corona Group v. United States,* 713 F.2d 1568, 1578 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984). The comparison is not fair unless comparable items are treated comparably. *See Torrington Co. v. United States,* 68 F.3d 1347, 1352–53 (Fed. Cir. 1995) (the statute and regulations require "adjustments to the base value of both foreign market value and United States price to permit comparison of the two prices at a similar point in the chain of commerce"). Commerce exceeded its authority in changing its accounting rule for home market indirect selling expenses without making a comparable adjustment in the United States calculation.

Commerce itself took the position put forward by Koyo, in subsequent administrative review of the comparative market values of antifriciton bearings. Referring to its obligation to make a fair value comparison, in 1995 the agency stated: "Because we do not consider Koyo's doubtful debt reserve to be an actual [home market] selling expense, we agree in principle with Koyo that doubtful debt reserves should not be treated as U.S. selling expenses either." *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom,* 60 Fed. Reg. 10,900 (Dep't. Comm. 1995) (final results fourth administrative review).

Parallel treatment of the doubtful debt reserves was improperly withheld for the review here at issue. It is not disputed that the two reserve accounts are equivalent of purpose and are directly comparable. Both should be included in the respective calculations of indirect selling expenses, or both excluded. *Smith-Corona,* 713 F.2d at 1578.

We reverse the decision that had sustained disparate accounting treatment of the doubtful debt reserve in the home market and the United States market. This issue is remanded for appropriate further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

ITT CORP., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 93–1313

(Decided May 3, 1994)

Rufus E. Jarman, Jr., Attorney, Barnes, Richardson & Colburn, of New York, New York, argued for plaintiff-appellant. With him on the brief was *Frederic D. Van Arnam, Jr.*

Carla Garcia-Benitez, Attorney, Department of Justice, of New York, New York, argued for defendant-appellee. With her on the brief were *Frank W. Hunger,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge International Trade Field Office. Of counsel was *Karen P. Binder,* Office of the Assistant Chief Counsel International Trade Litigation United States Customs Service.

Appealed from: United States Court of International Trade.
Judge RESTANI.

Before NIES,[1] LOURIE and CLEVENGER, *Circuit Judges.*

CLEVENGER, *Circuit Judge.*

ITT Corporation appeals the January 19, 1993 judgment of the United States Court of International Trade affirming the refusal by the U.S. Customs Service to reliquidate imported cast-iron automobile parts under a different tariff classification than originally assigned. The Court of International Trade held that even though ITT proved at trial *de novo* that a mistake of fact had occurred in classification, ITT was not entitled to reliquidation under 19 U.S.C. § 1520(c)(1) (1988) because the documentary evidence submitted by ITT to Customs was insufficient to establish the mistake of fact to Customs. *ITT Corp. v. United States,* 812 F. Supp. 213, 216 (Ct. Int'l Trade 1993). We reverse.

I

ITT imported cast-iron automobile parts. Customs liquidated the entries under item 692.32 of the Tariff Schedules of the United States

[1] Circuit Judge Nies vacated the position of Chief Judge on March 17, 1994.

(TSUS)[2] at a duty rate of 3.1 percent *ad valorem*. Within one year after the liquidations, ITT's customs broker filed claims with Customs pursuant to 19 U.S.C. § 1520(c)(1), seeking reliquidation of each entry under TSUS item 692.24, which specifies duty-free treatment, and thus the refund of duties paid at the time of entry.[3] The claims stated:

> We now have evidence in the form of samples of both castings which substantiate that the castings are more correctly classified under TSUS 692.2400.
>
> It is contended that the reclassification of these castings is correctable under Section [1520(c)]. A mistake of fact occurred in the initial creation of the broker's records which resulted in the subsequent misclassification of the entries covered by this claim * * *. A mistake of fact has been ruled to exist wherein an individual understands the facts to be other than they are, which is the case in this instance. The understanding was that these castings were actually brake parts classifiable under TSUS 692.32. The product was understood to be other than it actually was. (citations omitted).

On December 13, 1989 and April 19, 1990, Customs denied ITT's respective requests for reliquidation, both times stating that the "[e]rror involve[d] the construction of law." ITT filed timely protests under 19 U.S.C. § 1514 (1988) of Customs' refusals to reliquidate. Customs denied these protests, and ITT consequently filed a complaint with the Court of International Trade under 28 U.S.C. § 1581(a) (1988).

II

The Court of International Trade held a trial *de novo* pursuant to 28 U.S.C. § 2640(a) (1988). Despite its determination that the correct classification of ITT's merchandise was TSUS item 692.24 and not 692.32, the court affirmed Customs' refusal to reliquidate under 19 U.S.C. § 1520(c)(1). The court, however, disagreed with the basis for Customs' decision. Whereas Customs had rejected ITT's claims for asserting a mistake of law rather than a mistake of fact as required under § 1520(c)(1), the Court of International Trade instead found that ITT's letters actually had timely notified Customs of a mistake of fact. *ITT*, 812 F. Supp. at 216. The court, however, held that in addition to timely notice, § 1520(c)(1) requires an importer to substantiate its allegation by demonstrating that the mistake of fact is manifest from the record or established by documentary evidence. Moreover, the Court of International Trade interpreted § 1520(c)(1) as requiring that such a substanti-

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[2] Item 692 of the TSUS reads in pertinent part:

Chassis, bodies (including cabs), and parts of the foregoing motor vehicles (con.):
Other:

692.24	Cast-iron (except malleable cast-iron) parts, not alloyed and not advanced beyond cleaning, and machined only for the removal of fins, gates, sprues, and risers or to permit location in the finished machinery
*	* * * * * *
692.32	Other

Tariff Schedules of the United States Annotated 6–183 (1985).

[3] Although ITT's customs broker submitted two separate claims to Customs on September 21, 1989 and October 13, 1989, respectively, both claims asserted the same mistake of fact in Customs' classification with regard to identical merchandise. We thus consider these claims collectively.

ation be made to Customs before the reliquidation decision, rather than at a later time such as at a trial *de novo* before the court. The court concluded that while ITT established the mistake of fact at trial, ITT had failed to establish the mistake of fact to Customs prior to the reliquidation decision. *Id.* at 217. The Court of International Trade thus granted judgment for the Government.

III

In reviewing a judgment of the Court of International Trade, this court decides *de novo* the proper interpretation of the governing statute and regulations. *St. Paul Fire & Marine Ins. Co. v. United States,* 6 F.3d 763, 767 (Fed. Cir. 1993). The relevant statute here, 19 U.S.C. § 1520(c)(1), provides that:

> [T]he appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—
>
> (1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation * * *.

Furthermore, the regulation implementing § 1520(c)(1) sets forth that:

> Correction pursuant to * * * 19 U.S.C. § 1520(c)(1), may be made in any entry, liquidation, or other Customs transaction if the clerical error, mistake of fact, or other inadvertence:
>
> (1) Does not amount to an error in the construction of a law;
>
> (2) Is adverse to the importer; and
>
> (3) Is manifest from the record or established by documentary evidence.

19 C.F.R. § 173.4(b) (1993). Reliquidation under § 1520(c)(1) thus requires both notice and substantiation.

With regard to notice, the importer must assert the existence of an inadvertence to Customs "within the proper time and with sufficient particularity to allow remedial action." *Hambro Automotive Corp. v. United States,* 458 F. Supp. 1220, 1222 (Cust. Ct. 1978); *see Omni U.S.A., Inc. v. United States,* 840 F.2d 912, 916 (Fed. Cir. 1988) (affirming Court of International Trade's dismissal of untimely reliquidation request under § 1520(c)(1)). In this case, ITT brought to the attention of Customs within one year after liquidation that "[a] mistake of fact occurred in the initial creation of the broker's records which resulted in the subsequent misclassification of the entries covered by this claim." Moreover, ITT's statement that "[t]he product was understood to be other than it actually was" timely informed Customs that ITT sought reliqui-

dation based on a mistake of fact and not a mistake of law. ITT thus satisfied the § 1520(c)(1) requirement of a timely notification to Customs.[4]

With regard to substantiation, § 1520(c)(1) requires the importer to establish the asserted inadvertence through documentary evidence submitted to the appropriate customs officer, unless the inadvertence is manifest from the record. Inadvertences manifest from the record are those apparent to Customs from a facial examination of the entry and the entry papers alone, and thus require no further substantiation. While clerical errors likely compose the majority of such inadvertences, mistakes of fact nonetheless also can be manifest from the record that the entry and the entry papers constitute. Mistakes of fact that are not manifest from such record, however, must be established by documentary evidence.

In this case, nothing in the entry papers alone substantiated ITT's assertion that a mistake of fact had occurred. Furthermore, testimony at the trial *de novo* before the Court of International Trade revealed that the proper tariff classification would not be apparent from a visual examination of the samples of ITT's entries submitted to Customs. We therefore hold that the Court of International Trade was correct to the extent that it concluded ITT's mistake of fact was not manifest from the record or established by documentary evidence prior to Customs' reliquidation decision. For the following reasons, however, we hold that the Court of International Trade erred by interpreting § 1520(c)(1) as precluding the court's consideration at trial *de novo* of additional evidence, documentary or otherwise, which further substantiates the alleged mistake of fact, where the documentary evidence before Customs was insufficient to establish the mistake of fact to Customs.

IV

Based on documentary evidence submitted by ITT to Customs and testimony before the Court of International Trade at trial *de novo,* the court found that a mistake of fact had indeed occurred in ITT's liquidation. *ITT,* 812 F. Supp. at 216. Customs does not challenge this finding, which is amply supported by the record and not clearly erroneous. The court nonetheless held that ITT was not entitled to reliquidation under 19 U.S.C. § 1520(c)(1) because a mistake of fact was not established from the documentary evidence ITT submitted to Customs before the reliquidation decision. *Id.* at 216–17.

The Court of International Trade correctly recognized that the one-year provision of § 1520(c)(1) applies only to the notification to Customs of an alleged mistake of fact, and "not * * * to efforts to document the error." *Id.* at 216 (citing *George Weintraub & Sons, Inc. v. United States,* 691 F. Supp. 1449, 1451 (Ct. Int'l Trade 1988) ("The one year provision

[4] Section 1520(c)(1) does not afford a second bite at the apple to importers who fail to challenge Customs' decision within the 90-day period set forth in § 1514. Rather, Congress established a distinct timeliness requirement for the quite specific types of errors recognized under § 1520(c)(1). In its briefs and at oral argument, the Government thus mischaracterized ITT's submission of claims under § 1520(c)(1) as an attempt to circumvent ITT's failure to file a timely protest under § 1514 of Customs' classification decision. We emphasize that under no circumstances may the provisions of § 1520(c)(1) be employed to excuse the failure to satisfy the requirements of § 1514.

of § 1520(c) requires only that the mistake be brought to the attention of the Customs Service."); *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 336 F. Supp. 1395, 1400 (Cust. Ct. 1972), *aff'd on other grounds*, 499 F.2d 1277 (CCPA 1974)). The court further noted that unlike the importer in *C.J. Tower*, where "the appropriate data was filed after the one-year limit, but before Customs had decided the reliquidation claim * * *. [i]n this case [ITT] waited for trial before this court to present the bulk of its evidence." *Id.*

Nothing in § 1520(c)(1), however, precludes the importer from explaining with further evidence, documentary or otherwise, at trial *de novo* before the Court of International Trade how the documentary evidence it submitted to Customs substantiates the asserted inadvertence. A principal purpose of trial *de novo* under § 2640(a), after all, is to enable importers to prove the truth of the assertions they have made to Customs. While a prudent importer would submit all its supporting documentary evidence along with its timely notice alleging a mistake of fact before Customs' consideration in order to facilitate a prompt and favorable decision by Customs, neither statute nor case law precludes court-ordered reliquidation under § 1520(c)(1) after a trial *de novo*. Indeed, the interpretation of § 1520(c)(1) by the Court of International Trade here is contrary to the case law because under such an interpretation, denial by Customs of the reliquidation request the moment it is received would foreclose any opportunity for an importer to submit supporting documentary evidence after its timely notice alleging a mistake of fact. Moreover, such a statutory construction would bar an importer from ever establishing the mistake of fact by documentary evidence where Customs, as in this case, erroneously characterized the importer's timely notice as an allegation of a mistake of law.[5] The statute neither expresses nor suggests that the courts must grant Customs the authority to cause such harsh results.

The Court of International Trade correctly notes that "a party who waits past the time of filing its 19 U.S.C. § 1520(c)(1) request to file supporting documentation risks an adverse decision by Customs in the interim." *Id.* While true, such an adverse decision does not preclude an importer from introducing additional evidence, documentary or otherwise, at trial *de novo* before the Court of International Trade under § 2640(a) to substantiate further the alleged mistake of fact. Congress clearly envisioned a liberal mechanism for the correction of the specific inadvertences set forth in § 1520(c)(1). The legislative history to § 1520(c)(1) emphasizes the remedial purpose of the statute. *See Hearings on H.R. 5505 to Amend Certain Provisions of the Tariff Act of 1930 Before the Senate Comm. on Fin.*, 82d Cong., 2d Sess., at 30 (Comm.

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[5] In this case, Customs refused ITT's § 1520(c)(1) requests because Customs believed the asserted errors to be wholly outside the scope of the statute. Had Customs not erred in categorizing ITT's requests as claiming errors involving the construction of law, Customs presumably would have notified ITT of its intention to deny ITT's requests for want of sufficient proof that the mistakes of fact were manifest from the record or established by documentary evidence. Whereas under such circumstances ITT might have been able to submit all its supporting evidence to Customs before the reliquidation decisions, ITT in this case never had the opportunity to do so.

Print 1952) (statement of John S. Graham, Assistant Secretary, Department of Treasury) ("In the thousands of customs transactions, many such mistakes occur which should be corrected in order to do justice to the importing public. The Government has no interest in retaining duties which were improperly collected as a result of clerical error, mistake of fact, or inadvertence."); *Hearings on H.R. 1535 to Amend Certain Provisions of the Tariff Act of 1930 Before the House Comm. on Ways and Means,* 82d Cong., 1st Sess., at 172 (Comm. Print 1951) (statement of Philip Nichols, Jr., Assistant General Counsel, Treasury Department) (Notwithstanding "the finality provisions of the tariff act * * * we think it would greatly facilitate our treatment in dealing with and handling the public, and consequently enhancing the efficiency of the customs service, if plainly meritorious claims for the correction of errors could be acted on."); *id.* at 27 ("The refusal to correct patent errors causes hardship, needlessly injures public goodwill toward the customs service and public acceptance of the customs laws, and constitutes a psychological handicap to international trade."). The remedial purpose of § 1520(c)(1) would be substantially frustrated by the harsh results that could flow from a rule that a timely assertion of a mistake of fact cannot be proven at a trial *de novo* after Customs denies the reliquidation request.

Furthermore, by establishing a statutory scheme for review of Customs' denial of a § 1520(c)(1) reliquidation request in a trial *de novo* before the Court of International Trade under 28 U.S.C. § 2640(a), Congress contemplated the evaluation of evidence beyond that considered by Customs. *See United States v. Daewoo Int'l (Am.) Corp.,* 696 F. Supp. 1534, 1542 (Ct. Int'l Trade 1988) (characterizing the requirement of trial *de novo* as a review in which the court makes its own findings of fact "as opposed to referring to those on the agency record."). The Court of International Trade in this case correctly noted that an importer must provide Customs with information adequate to demonstrate a mistake of fact manifest from the record or established by documentary evidence *before* Customs' reliquidation decision in order for Customs to correct such an error *in the first instance.* However, evidence that can be considered at the trial *de novo* before the Court of International Trade to prove the truth of assertions made by ITT to Customs is not limited to merely that which is contained in the administrative record before Customs.[6] Such a restriction would undermine the importer's statutory right to a trial *de novo.* We therefore hold that the Court of International Trade improperly limited the basis of its decision regarding entitlement to reliquidation under § 1520(c)(1) to evidence submitted by ITT to Customs before the reliquidation decision.

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[6] Our holding should come as no surprise to Customs, which asserted that "[i]t is not sufficient for ITT's witnesses to declare that 'a mistake of fact or inadvertence' occurred. Rather they must testify or present other credible proof of the underlying facts that demonstrate the existence of such error * * *. In sum, *at trial,* ITT bears the burden of establishing [the customs broker's] alleged 'mistake of fact or other inadvertence,' by demonstrating the underlying facts needed for this Court to conclude that such allegation is proven." Def.'s Pretrial Mem. of Law at 13–14 (emphasis added).

V

As stated above, ITT provided sufficient evidence at trial to enable the Court of International Trade to find that a mistake of fact had occurred in the liquidation of ITT's merchandise and that the correct classification of ITT's merchandise was TSUS item 692.24 and not 692.32. Based on these findings and our interpretation of § 1520(c)(1) and § 2640(a), we conclude that ITT is entitled to reliquidation under TSUS item 692.24. The judgment of the Court of International Trade is therefore

REVERSED

WASHINGTON INTERNATIONAL INSURANCE CO., PLAINTIFF-APPELLEE *v.* UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 93–1114

(Decided May 16, 1994)

Edward M. Joffe, Sandler, Travis & Rosenberg, P.A., of Miami, Florida, argued for plaintiff-appellee. With him on the brief was *Jeremy Ross Page*.

John J. Mahon, Attorney, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellant. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General, *Frank W. Hunger*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office. Also on the brief was *Edward N. Maurer*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of counsel.

Appealed from: U.S. Court of International Trade.
Judge AQUILINO, JR.

Before ARCHER, *Chief Judge*,* SMITH, *Senior Circuit Judge*, and MAYER, *Circuit Judge*.

MAYER, *Circuit Judge*.

The United States appeals the October 6, 1992, judgment of the Court of International Trade, No. 84–05–00660, holding that "Rhinohide," a waterproof roofing material, is correctly classifiable under item 771.43 of the Tariff Schedules of the United States (1981). We affirm.

BACKGROUND

This case is about the proper classification of "Rhinohide," a waterproof roofing membrane, under the Tariff Schedules of the United States (TSUS) (1981). Rhinohide is a modified bitumen one-ply roofing membrane which is used to waterproof roofs. Analysis by Customs determined that by weight, Rhinohide is comprised of bitumen (85.5%), ethylene-propylene (9.1%), nonwoven polyester (3.2%), grit (2.0%), and polyethylene (0.2%). The nonwoven polyester is a fabric core which pro-

* Circuit Judge Archer assumed the position of Chief Judge on March 18, 1994.

vides stability for the bitumen-ethylene-propylene combination which in turn imparts the waterproofing properties. Bitumen is an asphalt product which occurs naturally or may be derived from petroleum.

Rhinohide was initially entered into the United States under TSUS item 523.91 as an article of asphalt for roofing. However, Customs liquidated the entries under item 355.25 as non-woven fabrics, whether coated or filled, of man-made fibers. Respondent Washington International Insurance Company, surety on the bond to the entries at issue, which occurred between June and December of 1981, filed an unsuccessful protest. It then appealed to the Court of International Trade.

The court held that Rhinohide was properly classified under item 771.43 as "[f]ilm, strips, sheets, plates, slabs, blocks, filaments, rods, seamless tubing, and other profile shapes, all the foregoing wholly or almost wholly of rubber or plastics * * *." It first found that bitumen met the definition of "synthetic plastics materials" for the purposes of part 12, schedule 7 of the TSUS. The court next found that bitumen imparted the essential characteristic of Rhinohide—a waterproofing material—which was therefore "almost wholly of" plastics. The United States appeals.

Discussion

The issue is whether bitumen is considered a plastic for purposes of part 12, schedule 7 of the TSUS, and should be entered under item 771.43 which covers:

> Film, strips, sheets, plates, slabs, blocks, filaments, rods, seamless tubing, and other profile shapes, all the foregoing wholly or almost wholly of rubber or plastics (con.):
>
> Not of cellulosic plastics materials:
>
> Film, strips, and sheets, all the foregoing which are flexible:
>
> * * * * * * *
>
> Other * * *

The headnote to part 12 of schedule 7 provides:

> 1. For the purposes of the tariff schedules—* * *
>
> (b) the term *"plastics"* refers to—
>
> (i) synthetic plastics materials, as defined in parts 1C and 4A of schedule 4,
>
> (ii) polyurethane,
>
> (iii) natural resins,
>
> (iv) protein substances, such as casein compounds,
>
> (v) regenerated cellulose,
>
> (vi) vulcanized fiber, and
>
> (vii) reinforced or laminated plastics, as defined in subpart A of this part * * *.

The definition of "synthetic plastics materials" referred to in section 1.(b)(i) above provides:

> 2. The term *"synthetic plastics materials"*, in this subpart, embraces products formed by the condensation, polymerization, or

> copolymerization of organic chemicals and to which an antioxidant, color, dispersing agent, emulsifier, extender, filler, pesticide, plasticizer, or stabilizer may have been added. These products contain as an essential ingredient an organic substance of high molecular weight; are capable, at some stage during processing into finished articles, of being molded or shaped by flow; and are solid in the finished article. The term includes, but is not limited to, such products derived from esters of acrylic or methacrylic acid; vinyl acetate, vinyl chloride resins, polyvinyl alcohol, acetals, butyral, formal resins, polyvinyl ether and ester resins, and polyvinylidene chloride resins; urea and amino resins; polyethylene, polypropylene, and other polyalkene resins; siloxanes, silicones, and other organo-silicon resins; alkyd, acrylonitrile, allyl, and formaldehyde resins, and cellulosic plastics materials. These synthetic plastics materials may be in solid, semi-solid, or liquid condition such as flakes, powders, pellets, granules, solutions, emulsions, and other basic crude forms not further processed.

part 4A, schedule 4, TSUS.

The parties agree that a material must satisfy four requirements if it is technically to meet this definition. The material must: 1) be formed by condensation, polymerization or copolymerization; 2) contain an organic substance of high molecular weight; 3) be capable of molding or shaping by flow; and 4) be solid in its finished state. The government contends that the Court of International Trade's evaluation of the facts under this four part test was clearly erroneous. However, the government's challenges to the court's fact findings amount only to the assertion that the testimony of its witnesses should have been given more weight. Upon reviewing the record and the court's opinion, we conclude that its analysis of each of the four factors was thorough and its conclusion is sound.

The government next argues that even if bitumen technically meets the definition of "synthetic plastics materials" provided in parts 1C and 4A of schedule 4, as a matter of statutory construction and legislative history it cannot be considered a plastic for the purpose of the TSUS. This is a question of law which we review de novo.

The government first points out, and Washington International agrees, that bitumen imported alone would be classified under item 521.11 of schedule 5, which provides for "asphaltum, bitumen and limestone rock asphalt." The government in essence contends that if Congress intended bitumen to be considered a plastic for tariff purposes, it would not have created a separate item under schedule 5 for bitumen if imported alone. Despite the fact that bitumen literally fits the definition of "synthetic plastics materials" provided in schedule 4, the government argues that because Congress did not allow bitumen to be imported as a plastic if imported alone, it also did not intend for bitumen to be a plastic if imported as a component of a product such as Rhinohide.

We cannot accept this argument. The statute provides that if a substance meets the definition in part 4A of schedule 4, it is considered a plastic for purposes of schedule 7. While a more specific provision con-

trols over a general one, *see Hills Materials Co. v. Rice,* 982 F.2d 514, 517 (Fed. Cir. 1992), so that bitumen alone is covered under schedule 5 and not schedule 4, the government does not point to a more specific provision which provides for bitumen *products.* Notwithstanding that schedule 5's provision for the importation of bitumen alone supersedes its importation under schedule 4, we see no reason to infer a similar bar to the treatment of bitumen as a plastic when part of a product.

Likewise, the legislative history does not support such an inference. A product literally included in a tariff definition may nonetheless be excluded upon a showing of legislative intent, *United States v. Andrew Fisher Cycle Co.,* 426 F.2d 1308, 1311 (CCPA 1970), but there must be "strong and sufficient indications that it was the intent of Congress" to exclude the product at issue, *id.; see also General Methods Corp. v. United States,* 458 F.2d 521, 523 (CCPA 1972) ("the basis for avoiding the literal interpretation of a provision must be clearly established"). Strong and sufficient indications are not present here.

The government points to part of the legislative history of the TSUS, which discusses the definition of rubber and plastics for the purpose of schedule 7:

> *Definition of rubber and plastics:*
>
> Headnotes to part 1 and part 4 of schedule 4 define the terms "synthetic plastics material" and "rubber". The provisions for these materials in schedule 4 are confined to basic crude forms. Headnote 1 to part 12 of this schedule defines the term "plastics" more broadly so as to include certain natural substances as well as the synthetic substances provided for in the chemical schedule. In addition, headnote 1 specifically names polyurethane, regenerated cellulose, and vulcanized fiber, to avoid any technical questions being raised as to their status as plastics. The definitions in headnote 1 of this part of the terms "rubber", "plastics", and "rubber or plastics" are concerned with their meaning as used in tariff provisions covering products made therefrom.

Tariff Classification Study, part 12, schedule 7, p. 447 (1960). Because this passage of the *Tariff Classification Study* states that materials such as polyurethane, regenerated cellulose and vulcanized fiber were included in the definition at part 12 of schedule 7 to avoid any technical question as to their status as plastics, and that that definition was broader than the definitions in the headnotes to part 1 and part 4 of schedule 4, the government says that the drafters of the TSUS intended that bitumen not be a plastic for tariff purposes. It appears to be arguing that bitumen must be excluded unless Congress specifically stated that bitumen should be included as a plastic under part 12, schedule 7.

This proposition is unacceptable. First, the fact that the *Tariff Classification Study* specifically included some items by name cannot be read to require the exclusion of unnamed items, especially where an item, such as bitumen, technically meets the definition of "synthetic plastics materials". Second, as Washington International points out, the passage can be read to suggest that Congress intended to encompass a wide

range of products within the definition of plastics for schedule 7 purposes, and the named products were meant to illustrate the broad scope of the definition. We see nothing in the legislative history or the statute itself which prohibits the classification of bitumen as a plastic for the purpose of part 12, schedule 7, once it is shown to meet the literal definition of "synthetic plastics materials".

Finally, the government argues that even if bitumen is a plastic for schedule 7 purposes, Rhinohide is not "almost wholly of" plastics as required to come under item 771.43. "'[A]lmost wholly of' means that the essential character of the article is imparted by the named material, notwithstanding the fact that significant quantities of some other material or materials may be present * * *." General Headnote 9(f)(iii), TSUS. Because we affirm the Court of International Trade's finding that bitumen is a plastic as defined by part 12, schedule 7, and the parties agree that ethylene-propylene is a plastic, the remaining question is whether the finding that these plastics impart the essential character of Rhinohide despite the presence of the polyester core is reversible.

The government's primary objection to this finding is based on *V.G. Nahrgang Co. v. United States*, 741 F.2d 1363 (Fed. Cir. 1984). In that case, an importer of a one-ply roofing membrane comprised of bitumen and polypropylene and a nonwoven polyester core argued that the product should be classified under the same item at issue here. The Court of International Trade rejected that argument because the importer presented insufficient proof that bitumen was a plastic. *V.G. Nahrgang Co. v. United States*, 6 CIT 85, *reh'g denied*, 6 CIT 210 (1983). This court affirmed, agreeing that there was a lack of proof. The analysis of whether the roofing product was "almost wholly of plastics" was limited to determining whether the polypropylene alone imparted the essential character of the article. In the present case Washington International made out its case that bitumen is a plastic. *Nahrgang* is irrelevant. Washington International is not bound by another importer's failure, in a case to which it was not a party, to meet its evidentiary burden.

The government's remaining arguments concern the sufficiency of the evidence that the bitumen and other plastics impart waterproofing properties which comprise the essential characteristic of the Rhinohide. We believe there was substantial evidence to support this conclusion, and the trial court's finding on this issue was not clearly erroneous.

CONCLUSION

Accordingly, the judgment of the Court of International Trade is affirmed.

AFFIRMED

S.I. STUD, INC., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 93–1544

(Decided May 23, 1994)

Carl R. Soller, Soller, Shayne & Horn, of New York, New York, argued for plaintiff-appellant. With him on the brief was *Margaret Hardy Sachter.*

James A. Curley, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Frank W. Hunger,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office. Also on the brief was *Karen P. Binder,* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel.

Appealed from: U.S. Court of International Trade.
Judge MUSGRAVE.

Before NEWMAN and PLAGER, *Circuit Judges,* and COHN, *District Judge.*[*]

NEWMAN, *Circuit Judge.*

The United States Court of International Trade[1] upheld the classification of certain threaded, headless fasteners as "studs" under item 646.57, Tariff Schedules of the United States ("TSUS"), or heading 7318.15.20, Harmonized Tariff Schedules of the United States ("HTSUS"), and not as "bolts" under item 646.54, TSUS, or heading 7318.15.20, HTSUS. The items are listed in the TSUS as follows:

> Bolts, nuts, studs and studding, screws, and washers (including bolts and their nuts imported in the same shipment, and assembled bolts or screws and washers, with or without nuts); screw eyes, screw hooks and screw rings; turnbuckles; all the foregoing not described in the foregoing provisions of this subpart, of base metal:
>
> Of iron or steel:

646.54	Bolts and bolts and their nuts imported in the same shipment ..	0.7% *ad val.*
646.57	Studs and studding	4.7% *ad val.*

The corresponding headings from the HTSUS are:

> Other screws and bolts, whether or not with their nuts or washers:

7318.15.20	Bolts and bolts and their nuts or washers entered or exported in the same shipment	0.7% *ad val.*
7318.15.50	Studs	4.7% *ad val.*
7318.19.00	Other	5.7% *ad val.*

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[*] The Honorable Avern Cohn, United States District Court for the Eastern District of Michigan, sitting by designation.

[1] *S.I. Stud, Inc. v. United States,* No. 90–12–00653, 1993 Ct. Int'l Trade LEXIS 124 (July 1, 1993) (Slip Op. No. 93–124).

The items imported are alloy steel headless fasteners, threaded over their entire length and having chamfered ends. These fasteners are used by passing them through holds in the things to be fastened, and securing them at each end with a nut. The importer argues that since the fasteners act as bolts, they should be so classified, and that "stud" should only apply to an article "applied as a fixed protuberance", Appellant's Brief at 8. The government argues that these fasteners more accurately meet the definition of studs, citing the mechanical and dictionary definitions relied upon by the Court of International Trade, and the testimony of experts before that court. For example, the McGraw-Hill Dictionary of Scientific and Technical Terms defines "stud" as "A short rod or bolt threaded at both ends without a head." *McGraw-Hill Dictionary of Scientific and Technical Terms,* 1843 (4th ed. 1989). These are the headless threaded rods here at issue. The same dictionary defines "bolt" as "a rod, usually of metal, with a square, round, or hexagonal head at one end and a screw thread on the other, used to fasten objects together." *Id.* at 247. *See also, Chambers Technical Dictionary* (1953) (defining "stud" as "A shank or headless bolt, generally screwed from both ends and plain in the middle. It is permanently screwed into one piece, to which another is then secured by a nut"); *ASME Boiler and Pressure Vessel Code* (American Society of Mechanical Engineers) *("Stud*—a threaded fastener without a head, with threads on one or both ends, or threaded full length").[2]

We affirm the decision of the Court of International Trade, for the reasons stated in its opinion *S.I. Stud, Inc. v. United States,* No. 90-12-00653 (Ct. Int'l Trade July 1, 1993).

AFFIRMED

PLAGER, *Circuit Judge,* dissenting.

I regret that I am unable to join my colleagues in their determination that something that looks like a bolt, works like a bolt, and is sold for the purpose of bolting things together, is nevertheless not a bolt, but a stud. The duck test—if it looks like a duck, walks like a duck, and quacks like a duck, then it's a duck—is the applicable test here.

The majority, rather than independently analyzing the matter, chooses to base their decision on the opinion of the Court of International Trade. With all due respect, that opinion is a testament to the triumph of formalism over common sense. In 19 pages of quotations from dictionaries, all conflicting, and references to burdens of proof, the court gives up making any sense of the case and simply holds for the Government.

[2] The term "stud" is also used to refer to "fixed protuberances" such as tire studs or hobnails, in addition to headless threaded rods. A "stud" does not become a "bolt" when it is not a fixed protuberance.

The problem is not that difficult. Congress cataloged all imaginable things, including metal fasteners, in the tariff schedules. For reasons that may be better left unknown, or at least unexplained, the tariff schedule taxes "bolts and their nuts" at 0.7%, but "studs" at 4.7%. It defines neither, but it is worth noting that bolts and nuts are mentioned together, while studs are not listed with nuts. The Government for obvious reasons prefers everything to be a stud; our job is to decide what is what, using common understandings (absent Congressional direction to the contrary).

The items in controversy are individual threaded metal rods, of various sizes from tiny to really big. They have a nut on one end; on the other end, instead of the traditional fixed head, there is another turnable nut. A clever idea, since in bolting something together with this item you can tighten from either end without torquing (i.e., having to turn) the rod itself. Any home mechanic will immediately get the idea. Indeed, many home mechanics probably have them in hand, since they are now commonly available in hardware stores.

Most of us are also familiar with studs, in the fastener sense. They are typically made from metal rod, sometimes with opposed threads at each end. One end is screwed or driven into a solid material, like a board or wall. To the other end is fastened something, sometimes with a wing nut or other type fastener. Look around, they are ubiquitous. The most characteristic aspect of studs is that they are usually employed as fixed protuberances, hence "tire studs" and similar names.[1]

In this case the specific use to be made of the items at issue, to which the Government agreed by stipulation, is bolting together adjacent flanges attached to the ends of large pipe sections. Slip op. at 3. Did anyone ever hear of studding something together? Customs itself recognizes the distinction. The Service has issued from time to time opinion letters advising how to distinguish one from the other. Following is a sample of record:

> A stud is a type of bolt, but is distinguished from "bolts" by its application. That is, a stud is usually anchored and provides a projection to which something may be fastened.

Customs Service Headquarters Ruling (HQ) 087977, dated December 5, 1990 (citing HQ 074004, dated April 3, 1986); *see also* HQ 089009, dated July 9, 1991. Even if Customs does not read its own correspondence, this court should. At the least we should mandate that Customs' rulings be hung on the wall of the office responsible for initially making this decision—I would suggest, however, not using a bolt.

[1] E.g., "stallions kept for breeding," Websters Third New International Dictionary.

NATIONAL ADVANCED SYSTEMS, PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 93–1496

(Decided June 9, 1994)

Thomas M. Peterson, Brobeck, Phleges & Harrison, of San Francisco, California, argued for plaintiff-appellant.

Bruce N. Stratvert, Attorney, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Frank W. Hunger,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office. Also on the brief was *Stephen Berke,* Office of the Assistant Chief Counsel, U.S. Customs Service, New York, New York, of counsel.

Appealed from: U.S. Court of International Trade.
Judge RESTANI.

Before MAYER, LOURIE, and SCHALL, *Circuit Judges.*

LOURIE, *Circuit Judge.*

National Advanced Systems[1] (NAS) appeals from the judgment of the United States Court of International Trade sustaining the decision of the United States Customs Service (Customs) classifying merchandise imported by NAS under Item 676.15 of the Tariff Schedules of the United States (TSUS) (codified at 19 U.S.C. § 1202 (1982)). *National Advanced Sys. v. United States,* No. 88–01–00015 (Ct. Int'l Trade June 24, 1993). Because the imported merchandise is properly classified as a "computing machine" under that tariff provision, we affirm.

BACKGROUND

NAS imports, sells, and services Hitachi computers in the United States, including the "R–9" line of mainframe computers. The R–9 computer, in its basic "uniprocessor" configuration, utilizes an instruction processor which decodes instructions and carries out arithmetic and logic operations. The computer's performance can be improved by means of a processing scheme known as "multitasking," whereby the operations normally performed by one instruction processor are shared by two instruction processors. The merchandise at issue allows for the conversion of the R–9 computer into a "multiprocessor" computer capable of implementing a multitasking scheme. Invoiced as an "Additional Instruction Processor" (AIP), the merchandise is structurally and functionally similar to the R–9's primary instruction processor and affords increased processing capacity when installed in the R–9 computer.

The imported merchandise entered the United States on October 17, 1984 from Japan. Customs classified the merchandise under Item 676.15, TSUS, a provision covering "[a]ccounting, computing, and other data-processing machines." The merchandise was liquidated on

[1] National Advanced Systems is the predecessor of Hitachi Data Systems Corp., which is wholly owned by Hitachi Data Systems Holding Corp., a corporation organized under the laws of Delaware. Hitachi Data Systems Holding is owned by Hitachi Ltd. of Japan (80.5%) and Electronic Data Systems Corp. of Texas (19.5%).

December 12, 1986 at a rate of 4.1% *ad valorem*. On May 4, 1987, NAS filed an administrative protest challenging Customs' classification decision. NAS asserted that the merchandise was properly classifiable as "[p]arts of automatic data-processing machines" under Item 676.54, TSUS, a duty-free provision.[2] Customs, which considered the AIP "an unfinished computer," denied the protest.

On December 29, 1989, NAS filed a complaint in the United States Court of International Trade contesting the denial of its protest pursuant to 28 U.S.C. § 1581(a) (1988). NAS alleged that Customs erred in classifying the AIP under Item 676.15 because the AIP is not a computing machine, but a component which merely enhances the performance of the R–9 mainframe computer. Moreover, NAS claimed that because the AIP is incapable of functioning without being installed in the R–9 computer, it is properly classifiable as a "part" under Item 676.54.

A trial *de novo* was held during which evidence and expert testimony was submitted by both parties on the issue whether the imported merchandise was a "computer."[3] The Court of International Trade ultimately rejected NAS's contention that the AIP was not a computing machine. Although the court acknowledged that the AIP could not perform useful work independently of the R–9 computer, it determined that "[n]onetheless, when installed in the R–9 mainframe system, the AIP computes." Slip op. at 5. In addition, the court concluded that the AIP was a "computer" for classification purposes because it contains all the basic elements of a stored-program digital computer, *i.e.*, memory, control, processing, and input/output links, "albeit in truncated form." *Id.* at 6. Accordingly, the trial court found in favor of Customs and entered judgment sustaining its classification decision. NAS now appeals.

Discussion

"The ultimate issue as to whether particular imported merchandise has been classified under an appropriate tariff provision is a question of law subject to *de novo* review. Resolution of that issue generally entails a two-step process of (1) ascertaining the proper meaning of specific terms within the tariff provision and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed. The first step is a question of law which we review *de novo*

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[2] The disputed tariff provisions are found in TSUS Schedule 6, Part 4, Subpart G (1986) ("METALS AND METAL PRODUCTS—Machinery and Mechanical Equipment) and read as follows:

Calculating machines; accounting machines, cash registers, postage-franking machines, ticket-issuing machines, and similar machines, all the foregoing incorporating a calculating mechanism:

676.15 Accounting, computing, and other data-processing machines

* * * * * * *

Parts of the foregoing:

676.54 Parts of automatic data-processing machines and units thereof, other than parts incorporating a cathode-ray tube.

[3] Both parties use the terms "computer" and "computing machine" interchangeably. We agree with the trial court that a computer is a type of computing machine. Thus, if the AIP meets the definition of a computer, it also satisfies the description "computing machine" under Item 676.15.

Respecting the other two terms of Item 676.15, the trial court concluded that the term "accounting machine" has a specific meaning and that the AIP does not fall within that term. It is not clear, however, whether the trial court, in holding that the AIP was a "computing machine," also determined that the AIP met the definition of "data-processing machine." Because the term "computing machine" is dispositive in the instant case, we need not address whether the other two tariff terms apply.

and the second is a question of fact which we review for clear error. In reviewing classification determinations, Customs' classification of imported merchandise is presumed to be correct and the burden is on a party challenging the classification to overcome that presumption." *Marcel Watch Co. v. United States,* 11 F.3d 1054, 1056 (Fed. Cir. 1993) (citations omitted).

NAS argues that the term "computing" generally refers to the ability to receive, execute, and complete computational problems. *A fortiori,* NAS asserts that a "computing machine" under Item 676.15 must have the self-standing ability to receive data directly from the user, to undertake assigned tasks, and to communicate results directly to the user. NAS argues that because an AIP is incapable of performing those functions on a stand-alone basis, it cannot be a "computing machine" covered by Item 676.15. That argument, however, does not compute.

The AIP is a large machine which contains an instruction unit, a general arithmetic unit, a floating-point arithmetic unit, and a buffer control unit. As with other components dedicated for use in an R–9 computer, the AIP cannot operate by itself but must be used in conjunction with the other main components of the computer.[4] For example, a person using an R–9 computer typically inputs a command via a main console consisting of a cathode ray tube display and a keyboard. When the entered command is received by the AIP, it is decoded and the necessary arithmetic and logical operations required to carry out the command are performed. During this process, the activity of the AIP is coordinated with the computer's main memory and the input/output processors by the computer's service processor. Thus, when operating as designed, the AIP functions similarly to that of the computer's primary instruction processor: the AIP receives, processes, and executes commands from the user. In other words, it computes.

That the AIP cannot compute without the other components comprising the R–9 computer system does not alter the critical fact that "once installed [the AIP] does computing." Slip op. at 7. The inability of the AIP to perform computations independent of the R–9 computer does not itself preclude the AIP from being classified as a "computing machine" under Item 676.15. Indeed, witnesses from both parties acknowledged that the R–9 computer's service processor, another "imbedded" device, qualifies as a computer under Item 676.15 notwithstanding that like the AIP, the service processor cannot perform useful work without other components.

NAS's contention that a device must possess stand-alone capability to compute in order to be classified as a computing machine finds no support in the statute. Neither Item 676.15 nor its superior heading imposes any requirement that an article must possess an "inherent" or

[4] The main components of a basic R–9 system include an input/output processor, a service processor, an instruction processor, a storage control unit, and main storage (memory).

"self-standing" ability to compute in order to be classifiable therein.[5] Nor does the statute make any distinction between "stand-alone" computers and "imbedded" computers. We reject NAS's attempts to engraft a limitation onto the tariff provision not clearly intended by Congress. The controlling question for classification purposes under Item 676.15 is whether the machine at issue "computes," irrespective of whether it does so by itself or in connection with another machine.

In *Fairchild Camera & Instrument Corp. v. United States,* 53 CCPA 122 (1966), our predecessor court rejected a similar argument that an article must have stand-alone capability in order to be classified under an *eo nomine* provision that describes it. The imported article in *Fairchild* was a photofluorographic device capable of making photographic records of mass chest X-ray surveys. The device was specially designed for use in connection with an X-ray apparatus and was not capable of general picture taking.[6] *Id.* at 125. Despite the article's inability to take photographs independently of the apparatus, the court held that the article was properly classified as a "photographic camera," not as a "part" of an X-ray apparatus, because it functioned as a camera once it was affixed to the apparatus.

Accordingly, we hold that the trial court did not err in concluding that the term "computing machine" in Item 676.15 does not require stand-alone capability to compute. Because the AIP does compute when installed in the R–9 computer, it falls within the scope of that tariff provision.

Alternatively, NAS contends that term "computing machine" covers only those machines equivalent to a stored-programmed digital computer having the ability to store and retrieve data for future use and to communicate directly with the user. In support of that restrictive interpretation, NAS relies on the historical, trade, and scientific usage of the term "computer." NAS claims that the weight of such evidence indicates that a machine must possess permanently stored memory and direct input/output capability in order to be considered a computer for purposes of Item 676.15.

Specifically, NAS alleges that at the time the TSUS was adopted,[7] the term "computer" referred invariably to the "von Neumann" computer model. Under the definition proposed by Professor John von Neumann in the mid-1940's, a computer must contain four core "organs": a memory organ, an arithmetic organ, a control organ, and an input/output ("I/O") organ. NAS contends that in enacting Item 676.15, Congress contemplated only von Neumann-type computers because that defini-

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[5] Item 676.15 is subject to the limitation of its superior heading requiring that the machine incorporate a "calculating mechanism." That general limitation is not in dispute in this appeal. *Cf. Burroughs Corp. v. United States,* 845 F.2d 321 (Fed. Cir. 1988).

[6] The device in *Fairchild* was found to be "basically the same" as the imported article at issue in *Westinghouse Electric International Company v. United States,* 28 Cust. Ct. 209, C.D. 1411 (1952). In *Westinghouse,* the U.S. Customs Court found that the imported article could "function as a camera only in connection with and as part of a specially constructed X-ray unit." *Id.* at 211. For purposes of classification, however, the court concluded that the article "nevertheless, in its final use, is a camera which takes and produces a photograph." *Id.* at 214.

[7] The TSUS was enacted in 1962 under the Tariff Classification Act of 1962, Pub. L. 87–456, 76 Stat. 72.

tion prevailed at the time of enactment. Because the AIP allegedly lacks requisite memory and I/O organs, NAS asserts that the trial court erred in concluding that the AIP is a computer as defined by von Neumann.

At the outset, we note that in determining that the AIP possesses all of the essential elements of a von Neumann computer, the trial court did not conclude that the term "computing machine" in Item 676.15 is limited to that particular type of computer. Neither the statute nor the extrinsic evidence produced at trial indicates that Congress intended to limit the scope of the statutory term to von Neumann-type computers. The issue for purposes of classification under Item 676.15 is whether the AIP is a "computing machine," not whether it meets the definition of a von Neumann computer.

Item 676.15 "is an *eo nomine* designation which includes all forms of the article." *Hasbro Indus., Inc. v. United States,* 7 Fed. Cir. (T) 110, 112, 879 F.2d 838, 840 (1989). The express language of Item 676.15 broadly covers "computing machines" and contains no terms of limitation confining its scope to machines having a specific kind of memory or input/output capability. *See Burroughs Corp. v. United States,* 11 CIT 291, 297, 664 F. Supp. 507, 513 (1987) (types of machines covered by item 676.15 are not limited to those having particular memory capacity, storage capability, and a reliance on software), *aff'd* 845 F.2d 321 (Fed. Cir.), *cert. denied,* 488 U.S. 854 (1988). Moreover, the pertinent legislative history is devoid of any indication that Congress intended to limit the provision's scope to a certain kind of computer. *See* U.S. Tariff Comm'n, *Tariff Classification Study: Explanatory and Background Materials—Schedule 6* at 274 (November 15, 1960); Proclamation No. 4707, 44 Fed. Reg. 72,348 (1979) and 3 C.F.R. 87 (1980).

At trial, testimony from experts of both parties established that a von Neumann computer was only one particular type of computer recognized by the industry at the time the TSUS was enacted. Evidence from various authoritative lexicographic sources additionally confirms the breadth of the term "computer" as used in industry and commerce. Although the definitions vary somewhat from source to source, they all concur that at the most fundamental level, a device is a computer if it is capable of carrying out calculations. None, however, restrict the definition of "computer" exclusively to a device having permanent memory and direct I/O capability.

We agree with the trial court that the term "computing machine," as properly construed, encompasses devices capable of computing, *i.e.,* receiving, executing and completing instructions involving calculations, and that it is not limited to devices equivalent to a stored-program digital computer. NAS has not established that the trial court's determination that the AIP is classifiable under Item 676.15 as a "computing machine" is clearly erroneous.

That, however, does not end our inquiry here in view of the possibility that "the importer's alternative [classification] may * * * be a *better* classification than the government's." *Jarvis Clark Co. v. United States,*

2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984). Because "the court's duty is to find the *correct* result, by whatever procedure is best suited to the case at hand," *id.*, we now consider NAS's alternative classification.

NAS argues that because the AIP is a mere component of the R–9 computer, it is properly classified under Item 676.54, a provision covering "parts of automatic data-processing machines." NAS asserts that this result is mandated by General Interpretative Rule (c), TSUS, which directs that "an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it." Under this so-called "rule of relative specificity," NAS insists that Item 676.54 prevails over Item 676.15 because the AIP is a "part" and is thus most specifically described by Item 676.54, as opposed to Item 676.15, which NAS claims is a general "basket" provision.

Contrary to NAS's assertions, Item 676.15 is not an indefinite residual or basket provision. Rather, as discussed *supra*, Item 676.15 is an *eo nomine* provision that specifically describes the imported merchandise by name. Although it is unclear under General Rule (c) which provision, the *eo nomine* provision or the "parts" provision, *most* specifically describes the AIP, General Interpretative Rule (ij) provides the answer. That rule instructs that "a provision for 'parts' of an article [Item 676.54] covers a product solely or chiefly used as part of such article, *but does not prevail over a specific provision for such part* [Item 676.15]" (emphasis added). As the trial court correctly recognized, that rule precludes classification of the AIP as a "part" under Item 676.54.

CONCLUSION

The Court of International Trade correctly concluded that the AIP was properly classified as a "computing machine" under Item 676.15. Accordingly, we affirm the trial court's judgment sustaining Customs' classification decision.

AFFIRMED

ALLIED-SIGNAL AEROSPACE CO., GARRETT ENGINE DIVISION AND GARRETT AUXILIARY POWER DIVISION, PLAINTIFFS-APPELLANTS *v.* UNITED STATES, TORRINGTON CO., AND FEDERAL-MOGUL CORP., DEFENDANT-APPELLEES

Appeal No. 94–1112

(Decided June 30, 1994)

Louis S. Mastriani, Attorney, Adduci, Mastriani, Schaumberg & Schill, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief was *Gregory C. Anthes.*

Velta A. Melnbrencis, Attorney, U.S. Department of Justice, of Washington, D.C., argued for defendant-appellee, The United States. With her on the brief were *Frank W. Hunger,* Assistant Attorney General and *David M. Cohen,* Director. Also on the brief were *Stephen J. Powell, Berniece A. Browne* and *Thomas H. Fine,* of counsel.

Frederick L. Ikenson, Attorney, Frederick L. Ikenson, P.C., of Washington, D.C., argued for defendant-appellee, Federal-Mogul Corporation.

Appealed from: United States Court of International Trade. *Judge* TSOUCALAS.

Before MICHEL, *Circuit Judge,* BENNETT, *Senior Circuit Judge,* and LOURIE, *Circuit Judge.*

LOURIE, *Circuit Judge.*

Allied-Signal Aerospace Company appeals from the judgment of the United States Court of International Trade affirming the determination on remand of the Department of Commerce, International Trade Administration (ITA), concerning antidumping duty margins for antifriction bearings from France. *Allied-Signal Aerospace Co. v. United States,* No. 91–08–00571 (Ct. Int'l Trade October 14, 1993). Because the ITA's determination is consistent with our holding in *Allied-Signal Aerospace Co. v. United States,* 996 F.2d 1185 (Fed. Cir. 1993) *(Allied-Signal I),* we affirm the judgment.

BACKGROUND

In this appeal, we revisit the two-tier methodology utilized by the ITA in determining the best information available (BIA) for a party that "refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes" an antidumping duty investigation. 19 U.S.C. § 1677e(c) (1988). The undisputed facts are recounted here to the extent they are pertinent to the issues on appeal.[1]

Following an investigation into whether antifriction bearings were being, or were likely to be, sold in the United States at less than fair value (LTFV), the ITA issued final orders imposing antidumping duties on antifriction bearings from France on May 15, 1989. The ITA subsequently conducted an administrative review of those orders for the period from November 9, 1988 through April 30, 1990. One of the companies subject to the review was SNFA S.A., a French manufacturer of customized aerospace bearings. SNFA was not one of the bearing

[1] A detailed history of this case is set out in *Allied-Signal I.*

manufacturers individually investigated by the ITA in the original LTFV investigation.

In responding to the ITA's request for information relating to SNFA's sales for the period under review, SNFA claimed that it was unable to supply all the requested data due to its limited resources and small sales volume. The ITA consequently resorted to the best information available, which it derived using its two-tier BIA methodology.[2] Deeming the first tier of the methodology to be applicable to SNFA, the ITA assigned duty rates of 66.42% and 18.37% to SNFA's sales of ball bearings and cylindrical roller bearings, respectively. Those rates constituted the highest rates assigned to any party from the original LTFV investigation.

Allied-Signal, a domestic importer of antifriction bearings, challenged the final dumping margins assigned to SNFA. Although the BIA methodology employed by the ITA was ultimately upheld on appeal in *Allied-Signal I,* we disagreed with the ITA's decision to apply the first tier of the two-tier methodology with respect to SNFA. We concluded that application of the first tier was improper because SNFA's failure to provide a complete response to the ITA's request for information was not caused by deliberate recalcitrance, but was due to its inability to provide the data. Because the record indicated that SNFA had substantially cooperated with the ITA, we remanded the case to allow the ITA to "recalculate the dumping margins at issue under the second tier of the two-tier BIA methodology." 996 F.2d at 1193.

The ITA issued its final remand results on July 27, 1993, assigning margins of 65.13% and 17.31% to SNFA's sales of ball bearings and cylindrical roller bearings, respectively. Consistent with the second tier of the BIA methodology, the ITA selected the "all others" rates from the LTFV investigation, which were higher than any rates calculated in the review period for those bearings. Allied-Signal contested the remand results, claiming that they were inconsistent with *Allied-Signal I.* The Court of International Trade sustained the ITA's determination and dismissed the action. Allied-Signal now appeals.

DISCUSSION

Dissatisfied with the results obtained on remand, Allied-Signal once again contests the ITA's application of the BIA methodology to SNFA. Allied-Signal contends that *Allied-Signal I* requires the ITA to use the highest rate calculated for any company in the administrative review as the second-tier BIA rate for a nonresponsive party, such as SNFA, who

[2] The two-tier BIA methodology is as follows:

1. When a company refused to cooperate with the [ITA] or otherwise significantly impeded these proceedings, we have used as BIA the higher of (1) The highest of the rates found for any firm for the same class or kind of merchandise in the same country of origin in the less than fair value investigation (LTFV) or (2) the highest rate found in this review for the same class or kind of merchandise in the same country of origin.

2. When a company substantially cooperated with our requests for information including, in some cases, verification, but failed to provide the information requested in a timely manner or in the form required, we have used as BIA the higher of: (1) The firm's LTFV rate for the subject merchandise (or the "all others" rate from the LTFV investigation, if the firm was not individually investigated), or (2) the highest calculated rate in this review for the class or kind of merchandise from the same country of origin.

56 Fed. Reg. 31705.

was not assigned its own rate from the original LTFV investigation. Allied-Signal alleges that on remand, the ITA violated the *Allied-Signal I* remand order by using the "all others" rates.

In support of that contention, Allied-Signal relies on the following passage in *Allied-Signal I:*

> The critical difference in BIA treatment under the first and second tiers lies in the range of LTFV margins subject to consideration as the best information available. Under the first tier, the ITA may consider the margin of *any* company involved in the prior LTFV investigation. *Under the second tier, the ITA may only consider a particular firm's own prior LTFV rate.*

996 F.2d at 1191 (emphasis added). Pursuant to that "order," and focusing on the underscored language, Allied-Signal argues that only the firm's own LTFV rate may be used. It asserts that, failing that, the ITA should have assigned to SNFA the highest rates calculated in the administrative review *(i.e.,* margins of 7.79% and 10.63% for ball bearings and cylindrical roller bearings, respectively), because SNFA was not assigned its own rates from the LTFV investigation.

The position taken by Allied-Signal in this appeal is a poorly disguised attempt to reargue what has already been decided in *Allied-Signal I.* By taking a sentence in the opinion completely out of the context in which it was written, Allied-Signal distorts its meaning and purpose. The paragraph in *Allied-Signal I* upon which Allied-Signal relies is part of a general discussion comparing the two tiers of the ITA's BIA methodology. In that discussion, we recognized that the basic distinction between the two tiers lies in subdivision (1) of each tier. In the first tier, subdivision (1) provides that the highest of the LTFV rates found for any firm can be used. In contrast, subdivision (1) of the second tier limits the applicable LTFV rate to the firm's own rate, assuming there is one. However, the latter subdivision contains an explicit provision instructing that "if the firm was not individually investigated," the "all others" rate from the LTFV investigation is to be considered. The ITA's inability to use the firm's own rate thus does not mandate use of the highest rate calculated in the administrative review.

Allied-Signal makes much of the fact that in analyzing the BIA methodology, we did not expressly recognize the second tier's "all others" proviso applicable to firms that were not individually investigated in the LTFV investigation. Allied-Signal suggests that in doing so, we amended the second tier to eliminate the proviso altogether. We reject that unjustified reading of *Allied-Signal I.*

In *Allied-Signal I,* we held unequivocally that the "two-tier methodology adopted by the ITA and used in its administrative review of antidumping duty orders is a reasonable and permissible exercise of the ITA's statutory authority to use the best information available when a respondent refuses or is unable to provide requested information." 996 F.2d at 1192. We then clearly directed the ITA to recalculate the dumping margins at issue under the second tier. The ITA's determination on

remand is consistent and in accordance with that directive. By reciting the language of the second tier in its entirety elsewhere in the opinion, *see* 996 F.2d at 1188, it should have been clear that we were aware of all of its provisions and did not judicially expunge the proviso by inference. Thus, use of the "all others" rate was not precluded.

Alternatively, Allied-Signal argues that the rates assigned to SNFA are not supported by substantial evidence in view of the ITA's failure to provide a reasonable explanation for its application of the "all others" rates from the LTFV investigation. Allied-Signal claims that because the ITA's use of the "all others" rates represents a departure from established agency practice respecting the determination of BIA for nonresponsive parties, the agency was "obligated to supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983). That argument reflects a basic misunderstanding of the nature of the ITA's "BIA policy."

In *Motor Vehicle,* the Supreme Court stated that an agency's decision to revoke an existing regulation promulgated under the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553, is void as arbitrary and capricious in the absence of a reasoned explanation for the revocation. As is explained below, Allied-Signal's reliance on *Motor Vehicle* in support of its contention that the ITA was required to afford a reasoned explanation for its application of a new BIA methodology is misplaced.

The ITA's selection of the "all others" rates under the second tier of its new BIA methodology was not the type of "change in course" contemplated in *Motor Vehicle* to which a rationale by the agency was required. Unlike the regulation at issue in *Motor Vehicle,* the BIA methodology employed by the ITA in previous investigations did not rise to the level of an agency regulation having the force and effect of law. The fact that the ITA's prior methodology may appear to have been a *de facto* BIA "policy" by virtue of its long-time or consistent use did not preclude the ITA from utilizing a different methodology when, as in the present case, the agency determined in its discretion that the circumstances so warranted.

In issuing the final results of the administrative review, the ITA explained that the determination of the best information available for a nonresponsive party is determined by the agency on a "case-by-case" basis. 56 Fed. Reg. 31705 (Issues Appendix, Section 5: Best Information Available). Here, the ITA concluded that the two-tier methodology was the appropriate means of assessing the best information available for SNFA. That conclusion was upheld in *Allied-Signal I* as consistent with the agency's delegated authority to determine what the best information available is for a particular respondent. *See* 996 F.2d at 1191. In view of the discretionary, case-by-case nature of the agency's BIA determinations, the ITA is obligated only to use a methodology consistent

with its statutory authority, and it is not required to supply a "reasoned analysis" justifying its adoption.

CONCLUSION

The judgment of the Court of International Trade sustaining the agency's determination on remand is affirmed.

AFFIRMED

CERAMICA REGIOMONTANA, S.A., PLAINTIFF-APPELLANT, AND CERAMICAS Y PISOS INDUSTRIALES DE CULIACAN, S.A. DE C.V. AND INDUSTRIAS INTERCONTINENTAL, S.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 95–1026

(Decided September 6, 1995)

Steven P. Kersner, Ross & Hardies, Washington, D.C., argued for plaintiff-appellant. With him on the brief were *Jeffrey S. Neeley* and *Roger Banks.*

Velta A. Melnbrencis, Assistant Director, Commercial Litigation Branch, Department of Justice, argued for defendant-appellee. With her on the brief were *Frank W. Hunger,* Assistant Attorney General and *David M. Cohen,* Director. Also on the brief were *Stephen J. Powell,* Chief Counsel for Import Administration, *Berniece A. Browne,* Senior Counsel, and *Boguslawa B. Thoemmes,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, Department of Agriculture.

Appealed from: U.S. Court of International Trade. *Judge* MUSGRAVE.

Before NEWMAN, CLEVENGER, and RADER, *Circuit Judges.*

Opinion of the court filed by *Circuit Judge* RADER. Dissenting opinion filed by *Circuit Judge* CLEVENGER.

RADER, *Circuit Judge.*

Ceramica Regiomontana, S.A., Ceramicas y Pisos Industriales de Culiacan, S.A. de C.V., and Industrias Intercontinental, S.A. (collectively Ceramica) challenged the International Trade Administration's (ITA's) imposition of duties on ceramic tile imported after April 23, 1985, in the United States Court of International Trade. The Court of International Trade denied the challenge. *Ceramica Regiomontana, S.A. v. United States,* 853 F. Supp. 431, 439 (Ct. Int'l Trade 1994) *(Ceramica I).* Ceramica appeals from the Court of International Trade's entry of final judgment. *Ceramica Regiomontana, S.A. v. United States,* 861 F. Supp. 150 (Ct. Int'l Trade 1994) *(Ceramica II).* Because ITA lacked statutory authority to impose these countervailing duties, this court reverses and remands.

BACKGROUND

The United States countervailing duty laws protect domestic industries from unfair foreign competition. When a foreign government pro-

vides a subsidy to a foreign importer for the manufacture, production, or export of goods, ITA may impose a countervailing duty on imports of those goods. 19 U.S.C. § 1671(a) (1988), *as amended by* Uruguay Round Agreements Act, Pub. L. No. 103–465, § 262, 108 Stat. 4809, 4910 (1994). The countervailing duty equals the amount of the subsidy. *Id.*

Before ITA may impose countervailing duties, the International Trade Commission (ITC) must make an affirmative injury determination. *Id.* ITC must find that the imports caused, or threatened to cause, material injury to a domestic industry, or that the imports materially retarded the establishment of a domestic industry. *Id.*

Before 1980, Title 19 did not require an injury determination for dutiable goods. *See* Tariff Act of 1930, ch. 497, § 303, 46 Stat. 590, 687, *as amended by* Trade Act of 1974, Pub. L. No. 93–618, § 331(a)(1), 88 Stat. 1978, 2049 (1975) (codified as amended at 19 U.S.C. § 1303(a)(1) (1976)). An early version of the countervailing duty law provided:

> Whenever any country * * * shall pay or bestow * * * any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country * * * then upon the importation of such article or merchandise into the United States * * * there shall be levied and paid * * * in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

19 U.S.C. § 1303(a)(1) (1976).

The Trade Act of 1974 authorized the President to negotiate an international subsidies code with the United States' trading partners to set uniform conditions for imposing countervailing duties. Trade Act of 1974, § 102(b), 88 Stat. at 1982–83. The Subsidies Code, signed in 1979, arose out of the Tokyo Round of the General Agreement on Tariffs and Trade (GATT) negotiations (1973–1979). *See* Agreement of Interpretation and Application of Articles VI, XVI, & XXIII of the GATT (Subsidies Code), *reprinted in* II Bruce E. Clubb, *United States Foreign Trade Law* 648–49 (1991). Article VI of the GATT requires a finding of material injury to a domestic industry before imposition of countervailing duties. The General Agreement on Tariffs and Trade, Oct. 30, 1947, art. VI, § 6(a), *reprinted in Law and Practice Under the GATT,* ch. I.A., at 14 (Kenneth R. Simmonds & Brian H.W. Hill eds. 1994). By acceding to the Subsidies Code, the United States agreed to incorporate GATT's Article VI material injury requirement into its national countervailing duty law for all proceedings involving its signatory partners. Subsidies Code, art. I, *reprinted in* Clubb, *supra,* at 650.

In 1979, Congress amended the countervailing duty laws to comply with United States obligations under the Subsidies Code. Trade Agreements Act of 1979, Pub. L. No. 96–39, 93 Stat. 144 (codified as amended in scattered sections of 19 U.S.C.) (the 1979 Act). The 1979 Act, however, left the existing countervailing duty law in place, in amended form, to apply to countries that did not sign the Subsidies Code or an equivalent

agreement. 19 U.S.C. § 1303(a)(1) (1988) (repealed 1994).* The 1979 Act amended section 1303(a)(1) to specifically exclude any "article or merchandise which is the product of a country under the Agreement." 1979 Act, § 103(a), 93 Stat. at 190.

For "countries under the Agreement," the 1979 Act provided a new statutory provision for imposition of countervailing duties. 1979 Act, § 701, 93 Stat. at 151 (codified at 19 U.S.C. § 1671). This provision applies to countries that signed the Subsidies Code or have since assumed substantially equivalent obligations by agreement with the United States. 19 U.S.C. § 1671(a) (setting forth requirements for imposing countervailing duties); 19 U.S.C. § 1671(b) (defining "country under the Agreement"). Thus, as of 1980, and during the time at issue in this case, the United States had two standards for countervailing duties: section 1671 for "countries under the Agreement" and section 1303 for all others.

The major difference between the two standards of title 19 is the injury determination requirement. Section 1303 authorizes imposition of countervailing duties without an injury determination. 19 U.S.C. § 1303(a)(1),(b). Section 1671, however, bars imposition of countervailing duties until after ITC makes an injury determination. 19 U.S.C. § 1671(a). In 1982, ITA issued a countervailing duty order on ceramic tile imported from Mexico. *Final Affirmative Countervailing Duty Determination; Ceramic Tile from Mexico and Countervailing Duty Order,* 47 Fed. Reg. 20,012 (Dep't Comm. 1982). Because Mexico was not at that time a "country under the Agreement" within the meaning of 19 U.S.C. § 1671(b), ITA issued the order under section 1303. *See id.* at 20,015. Accordingly, ITC did not conduct a material injury determination.

On April 23, 1985, Mexico and the United States signed the Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties (the Understanding). Effective on that date, the United States Trade Representative officially designated Mexico a "country under the Agreement." *Determination Regarding the Application of Certain International Agreements,* 50 Fed. Reg. 18,335, 18,335–36 (U.S. Trade Rep. 1985).

On June 29, 1988, ITA initiated an administrative review of the 1982 Order. *Initiation of Antidumping and Countervailing Duty Administrative Reviews; Construction Casting From Brazil,* 52 Fed. Reg. 23,330, 23,330–31 (Dep't Comm. 1987). This review covered entries of ceramic tile imported between January 1, 1986 and December 31, 1986. *Id.* ITA published its final results in 1989. *Ceramic Tile From Mexico; Final Results of Countervailing Duty Administrative Review,* 54 Fed. Reg. 19,930 (Dep't Comm. 1989). ITA determined that Ceramica owed countervailing duties for tile imported during the review period and instructed Customs to assess the duties. *Id.* at 19,932.

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* Congress repealed 19 U.S.C. § 1303 effective January 1, 1995. Uruguay Round Agreements Act, Pub. L. No. 103–465, § 261(a), 108 Stat. 4809, 4908 (1994). Repeal of this section, however, does not affect the outcome of this appeal.

Ceramica challenged the final results in the Court of International Trade. Ceramica argued that ITA lacked authority to impose the countervailing duties on tile imported after April 23, 1985—the date Mexico became a "country under the Agreement." Once Mexico became a "country under the Agreement," Ceramica asserted, ITA could only assess duties under section 1671. Section 1671 requires an injury determination. Because ITC had not conducted an injury determination, Ceramica concluded that ITA must revoke the outstanding countervailing duty order as of April 23, 1985.

The Court of International Trade denied Ceramica's challenge and remanded on different grounds. *Ceramica I,* 853 F. Supp. at 439. After consideration of ITA's remand results, the Court of International Trade entered final judgment dismissing the case. *Ceramica II,* 861 F. Supp. at 150. Ceramica appeals.

Discussion

The issue on appeal is whether ITA has authority to impose countervailing duties on ceramic tile imported from Mexico after April 23, 1985—the date Mexico became a "country under the Agreement" as defined by section 1671(b)—absent an injury determination. Put another way, this court must decide whether Mexico's change in status to a "country under the Agreement" deprives ITA of statutory authority to assess duties on ceramic tile imported after the status change, based on an order properly issued before the status change under section 1303(a)(1).

This court reviews issues of statutory interpretation *de novo. Chaparral Steel Co. v. United States,* 901 F.2d 1097, 1100, 8 Fed. Cir. (T) 101, 105 (1990). "If the statutory language is clear, then 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Id.* at 1101 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–43 (1984)).

Section 1303(a)(1) of Title 19 authorizes ITA to impose countervailing duties on dutiable goods imported from certain countries. 19 U.S.C. § 1303(a)(1). Section 1303(a)(1) specifically excepts goods imported from "countr[ies] under the Agreement" from its scope:

> *Except in the case of an article or merchandise which is the product of a country under the Agreement (within the meaning of section 1671(b) of this title),* whenever any country * * * shall pay * * * any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country * * * then *upon the importation* of such article or merchandise into the United States * * * there shall be levied and paid * * * a duty equal to the net amount of such bounty or grant, however the same shall be paid or bestowed.

Id. (Emphasis added.)

By its language, section 1303(a)(1) ceases to operate as authority for countervailing duties on goods imported after the importing country

has become a "country under the Agreement." The language of section 1303(a)(1) links the importing country's status—which is determinative of the section's applicability—to the time of importation of goods under review. As recited in the statute, except for goods imported by a country under the Agreement, ITA shall levy a duty "upon the importation" of subsidized goods. Countervailing duties are imposed upon entry or importation of goods, not upon issuance of the original countervailing duty order. *See Cementos Guadalajara, S.A. v. United States,* 686 F. Supp. 335, 351 (Ct. Int'l Trade 1988), *aff'd.,* 879 F.2d 847, 848, 7 Fed. Cir. (T) 113, 114 (1989), *cert. denied,* 494 U.S. 1016 (1990). It is at this time—the time of importation of the goods—that ITA must evaluate whether a country is a "country under the Agreement" to determine whether section 1303 or section 1671 applies.

Mexico became a "country under the Agreement" on April 23, 1985. Ceramic tile imported after that date falls outside the scope of section 1303(a)(1). Ceramica imported the ceramic tile under review between January 1, 1986 and December 31, 1986. Because that ceramic tile entered after Mexico's recognition as a "country under the Agreement," section 1303(a)(1) does not apply.

Any other reading of section 1303(a)(1) would lead to the absurd conclusion that a country with outstanding countervailing duty orders would have to pay duties on those orders potentially in perpetuity, even after becoming a "country under the Agreement." A valid countervailing duty order under section 1303 does not establish a legal basis for imposition of duties into perpetuity. Rather, the importation of goods during the year in review triggers the duties. *Cementos Guadalajara,* 686 F. Supp. at 351 ("That the liability for duties is established at the time of entry of the goods into the United States has been recognized as an axiom of countervailing duty law.").

After Mexico became a "country under the Agreement," the only provision under which ITA could continue to impose countervailing duties was section 1671. Section 1671 requires ITC to conduct an injury determination. 19 U.S.C. § 1671(a)(2). ITC, however, did not conduct an injury determination in connection with the subject administrative review. Thus, this court holds that neither section 1303(a)(1) nor section 1671 authorized Commerce to collect duties on ceramic tile imported from Mexico after April 23, 1985.

The 1979 Act included transition rules. 1979 Act, § 104, 93 Stat. at 190–93 (codified at 19 U.S.C. § 1671 note (1988)). The transition rules addressed countervailing duty orders in effect on January 1, 1980, for countries under the Agreement. 1979 Act, § 104(b), 93 Stat. at 191–92. The countervailing duty order against Mexico's ceramic tile imports issued in 1982. Thus, the transition rules do not apply in this case.

Moreover, the clear language of section 1303(a)(1) trumps any language contained in the Understanding. *See Cementos Anahuac del Golfo, S.A. v. United States,* 689 F. Supp. 1191, 1211 (Ct. Int'l Trade 1988) ("United States countervailing duty law is the source of direction

and guidance in this [countervailing duty] matter."), *aff'd., Cementos Guadalajara, S.A. v. United States,* 879 F.2d 847, 848, 7 Fed. Cir. (T) 113, 114–15 (1989), *cert. denied,* 494 U.S. 1016 (1990). The only effect attributable to the Understanding is to change Mexico's status to that of a "country under the Agreement." Title 19 governs the imposition of countervailing duties.

In sum, when Mexico attained the status of a "country under the Agreement," section 1303 no longer applied because Congress expressly limited that statute to countries other than those under the Agreement. The only statutory authority upon which Congress could impose duties was section 1671. Without the required injury determination, Commerce lacked authority to impose duties under section 1671. *See* 19 U.S.C. § 1671(a)(2).

CONCLUSION

Because Commerce lacks statutory authority to impose countervailing duties on goods imported by Mexico after April 23, 1985, this court reverses and remands with instructions to revoke the 1982 Order effective April 23, 1985, and to refund to Ceramica any duty deposits at issue in this case.

COSTS

Each party shall bear its own costs.

REVERSED AND REMANDED

CLEVENGER, *Circuit Judge,* dissenting.

This case involves a countervailing duty order issued in 1982, at a time when Mexico was not a "country under the Agreement", and hence at time when the products at issue here, dutiable ceramic tile, were lawfully subjected to countervailing duties without any injury determination having been made. Mexico became a "country under the Agreement" in 1985. As a result of an administrative review of calendar 1986, which did not include an injury determination for the review period, Customs assessed countervailing duties against Ceramica under the 1982 order.

The court holds that the United States—absent an injury determination—may not levy and collect these countervailing duties, even though assessed pursuant to a valid countervailing duty order. I read the court to say that it reaches this conclusion under the plain meaning of two statutes, 19 U.S.C. §§ 1303 and 1671. The authority to levy countervailing duties without making injury determinations ceases on the day a country becomes one "under the Agreement", for exports made after that date. The only authority under which dutiable imports from Agreement countries can be subjected to countervailing duties is then found

in section 1671. Since section 1671 speaks only of duties that "shall be imposed" after, *inter alia*, an injury determination is made, and does not distinguish between countervailing duties imposed for the first time under a section 1671 countervailing duty order and duties imposed as a result of administrative reviews of a section 1303 order which conclude that duties under the original order must be continued, the court concludes that *any* countervailing duty imposed on exports from an Agreement country is a section 1671 duty. Without saying so explicitly, the court decides as a matter of statutory construction that the word "imposed" in section 1671 means imposed in any fashion on imports made after a country becomes an Agreement country, as opposed to imposed by an initial countervailing duty order issued after a country becomes an Agreement country, pursuant to all the requirements of section 1671.

The court's result seems to make eminent good sense, but it is in tension with the history of the statutes, which includes the transition statute mentioned in passing by the court. The court's failure to come to grips with the meaning and purpose of the transition statute is for me its Achilles' heel.

When Congress enacted section 1671 in 1979, there were many outstanding countervailing duty orders affecting imports from many countries. At the same time, the United States was eager to encourage countries not yet acceding to the Subsidies Code (mentioned by the court) to do so promptly, either directly or by Agreement with the United States, so as to entitle dutiable imports from their countries to the benefit of injury determinations before imposition of countervailing duties by the United States. As an inducement to that end, Congress wrote transition rules in section 104(b) of the 1979 Act, which affected outstanding countervailing duty orders. Those statutory transition rules provided that if a country became an Agreement country before January 1, 1980, its government, and in some limited circumstances even its exporters, could request that an injury determination be made on countervailing duty orders issued before January 1, 1980. The request could be made within three years after the effective date of the 1979 Act, and if the injury determination was negative, then the countervailing duty order would be revoked and no countervailing duties would be collected from the date of receipt of the request. 93 Stat. 191–92. Of course, the transition statute does not *apply* to this case, which involves a post January 1, 1980, countervailing duty order. But whether the transition statute applies to this case is not the question. The question is whether the transition statute teaches us that the court's interpretation of sections 1303 and 1671 is incorrect.

The transition rule statute on its face demonstrates that Congress had its eye on the situation presented by this case, and indeed sought to use the threat of continuation of duties levied under orders lacking injury determinations to nudge countries into the GATT fold. Beyond the face of the statute, its legislative history speaks directly to the mat-

ter at hand: "Selective application of section [1671] is intended to encourage countries to assume the obligations of the agreement * * *." S. Rep. No. 249, 96th Cong., 1st Sess. 45 (1979).

The court's holding in this case nullifies this aspect of the statutory transition rules. Under the court's holding, there is no need for a new Agreement country to request an injury determination within three years after becoming a signatory country, because the preexisting countervailing duty order becomes unenforceable immediately upon signing an Agreement, and remains so until the United States initiates and completes a new investigation under section 1671. In addition to the nullification of a statute, the court's holding further concludes that the statute nullified was itself unlawful, since it mistakenly conditioned the right to an injury determination, when Congress in the same statute in 1979 enacted the unconditional right to an injury determination. In my view, the court double faults at match point on the transition statute.

In fairness to the court and Ceramica's brief, however, another reading of the effect of the transition statute is possible. Section 104(c) of the transition rules, 93 Stat. 192, provided that existing orders would remain in effect and thus avoid being declared inoperable. According to Ceramica, this transition provision was necessary to validate preexisting countervailing duty orders that would have been inoperative on this court's reasoning in this case. To its credit, however, Ceramica concedes the softness of its argument by noting that, under the transition rules, exporters whose countries did *not* request injury determinations would be left exposed to imposition of duties under the old-non-injury-determination orders.

I thus have problems with the court's holding. I think that the meaning of the two statutes themselves leaves uncertain whether every countervailing duty imposed on entries after a country signs an Agreement, in the circumstances of this case, is a duty "imposed" under section 1671, as opposed to a duty levied under a preexisting Section 1303 lawful countervailing duty order. Given some ambiguity in the statutes themselves, fuelled quite considerably by the nullification of another statute to reach the court's conclusion, I would conclude that the government retains the right to levy under old countervailing duty orders, without making injury determinations, in the factual circumstances of this case. Were I writing for the court instead of for myself, I would lay out the *Chevron* doctrine, and explain why this is an apt case for its application, given the failure of Congress to have directly answered the question at bar in the statute, and the expertise and authority of the particular administrative agency to fill in the legislative gap, especially when so well guided by the history of the statutes involved.

Although I find fault with the court's decision in this case, I am unable to determine if this case matters much to the government. I assume that we will hear from the United States by way of a petition for rehearing if recent developments under GATT will be severely compromised by this decision, or if the consequences to the fisc or our international relations

will be significantly impaired by our holding. As yet, we have no signal that this is anything more than a garden variety case of statutory interpretation, in which one judge parts company respectfully with two respected colleagues.

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS-APPELLEES *v.* UNITED STATES, DEFENDANT-APPELLANT, AND TIMKEN CO., DEFENDANT

Appeal No. 94–1363

(Decided September 20, 1995)

D. Christine Wood, Attorney, Powell, Goldstein, Frazer & Murphy, Washington, D.C., argued for plaintiffs-appellees. On the brief were *Peter O. Suchman* and *Susan P. Strommer.*

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, U.S. Department of Justice, Commercial Litigation Branch, Civil Division. *Velta A. Melnbrencis,* Assistant Director, Civil Litigation Branch, Civil Division, Washington, D.C., argued for defendant-appellant. Of counsel were *Stephen J. Powell,* Chief Counsel, *Berniece A. Browne,* Senior Counsel, and *Linda S. Chang,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Washington, D.C.

Appealed From: U.S. Court of International Trade.
Judge TSOUCALAS.

Before ARCHER, *Chief Judge,* SKELTON, *Senior Circuit Judge,* and SCHALL, *Circuit Judge.*

SCHALL, *Circuit Judge.*

The United States appeals the September 21, 1993 decision of the United States Court of International Trade in *Koyo Seiko Co. v. United States,* 834 F. Supp. 431 (Ct. Int'l Trade 1993). In its decision, the court held that the International Trade Administration ("ITA") of the Department of Commerce ("Commerce") erred in one aspect of its calculation of final dumping margins for certain entries by Koyo Seiko Co., Ltd. and Koyo Corp. of U.S.A., Inc. (collectively "Koyo").[1] Because the court erred by failing to defer to Commerce's reasonable interpretation of the statutory provisions at issue, we affirm in part, reverse in part, and remand.

BACKGROUND

I. *The Calculation of Antidumping Duties:*

Under the statutory provision governing the imposition of antidumping duties, Commerce is required to impose additional duties on imported merchandise that is being sold, or is likely to be sold, in the United States at less than fair value to the detriment of a domestic

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[1] The Timken Company, a defendant below, is not a party to this appeal.

industry. 19 U.S.C. § 1673 (1988).[2] *See Smith-Corona Group v. United States,* 713 F.2d 1568, 1571, 1 Fed. Cir. (T) 130, 132 (1983), *cert. denied,* 465 U.S. 1022 (1984). Commerce imposes a duty, otherwise known as the "dumping margin," equal to the "amount by which the foreign market value exceeds the United States price for the merchandise." 19 U.S.C. § 1673 (1988).[3] Foreign market value, or "FMV," is the "price * * * at which such or similar merchandise is sold * * * in the principal markets of the country from which exported." 19 U.S.C. § 1677b(a)(1) (1988). If Commerce cannot determine FMV on the basis of market prices, then FMV may be the constructed value ("CV") of the merchandise. *See* 19 U.S.C. § 1677b(a)(2) (1988) ("If * * * the foreign market value of imported merchandise cannot be determined * * * then * * * the foreign market value of the merchandise may be the constructed value of that merchandise.").[4] Before Commerce can compare the United States price, or "USP," to the FMV of the imported merchandise, it first must determine what merchandise is "such or similar" to that sold in the United States.[5] In short, Commerce must "match" the U.S. product to a similar home-market product. The central issue in this case is whether the Court of International Trade erred in failing to defer to Commerce's chosen methodology for determining, and its determination of, what is "such or similar" merchandise under 19 U.S.C. § 1677b.

II. *Facts of the Case:*

In 1986, Commerce initiated an antidumping investigation of certain tapered roller bearings (TRBs) from various countries. *Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers From Hungary, Italy, Japan, The People's Republic of China, Romania, and Yugoslavia,* 51 Fed. Reg. 31732 (Dep't Comm. 1986). The investigation covered TRBs with a wide range of uses. Koyo

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[2] After proceedings in the Court of International Trade and briefing in this court were completed, the relevant statutes, 19 U.S.C. §§ 1673, 1677, and 1677b, were amended. The amendments that were made do not affect either the outcome or the analysis in this case. Where there has been a change to a statutory provision that we discuss, however, we note it. For ease of reference, we speak in the present tense when referring to the statutes in their pre-amended form.

[3] 19 U.S.C. § 1673 has been amended to substitute the words "normal value" for "foreign market value" and "export price (or the constructed export price)" for "United States price." 19 U.S.C. § 1673 (1994).

[4] 19 U.S.C. § 1677b has been amended to substitute the words "normal value" for "foreign market value" and "subject merchandise" for "imported merchandise." 19 U.S.C. § 1677b(a)(4) (1994).

[5] The term "such or similar merchandise" is defined as follows:

> The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for purposes of part II of this subtitle can be satisfactorily made:
>
> (A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16) (1988).

Section 1677(16) has been revised by the substitution of "foreign like product" for "such or similar merchandise" and the deletion of the phrase "which is the subject of an investigation" from subsections (A) and (B). 19 U.S.C. § 1677(16) (1994).

Seiko Co., Ltd. manufactures TRBs in Japan and exports them to the United States, and its affiliate Koyo Corp. of U.S.A. sells them in the United States. During the less-than-fair-value investigation of TRBs from Japan, Commerce considered comments regarding the factors that should be considered in determining which TRBs sold in the home market should be matched with the TRBs sold in the United States.

In due course, Commerce selected six criteria that it used to match U.S. TRBs with home-market TRBs:

> 1) the outside diameter ("OD") of the bearing;
> 2) the inside diameter ("ID") of the bearing;
> 3) the width ("W") of the bearing;
> 4) the type of bearing in terms of its physical characteristics, including the number of rows of rollers, flanges, seals, configurations of multiple rows of rollers, and whether the bearing is heat treated;
> 5) the dynamic, or basic load rating ("BLR"), which is the constant stationary load that the bearing can endure for one million revolutions of the inner ring; and
> 6) the Y factor, which measures the effect of thrust loads on the expected life of a bearing.

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, 52 Fed. Reg. 30700, 30701–02 (Dep't Comm. 1987) (final determination). The fourth factor is not quantified by a single number for purposes of statistical analysis, and thus the remaining five factors are referred to as the "five criteria."

In the less-than-fair-value investigation, Commerce compared each U.S. TRB model to all TRB models in the home market for which the deviation for each of the five criteria was ten percent or less. *Id.* at 30702. (That is, if any home-market TRB differed from the U.S. model by more than ten percent in any of the five criteria, that home-market TRB was not considered to be "such or similar" merchandise for purposes of calculating the antidumping duty.) From that group of similar home-market TRBs, Commerce then selected, as the most similar TRB, the home-market TRB model with the criterion whose greatest degree of deviation from the same criterion in the U.S. model was nevertheless smaller than the greatest degree of deviation in any of the other similar TRBs.[6] *Id.* Where there was a deviation in only one factor, Commerce compared TRBs for which the deviation was slightly over ten percent. *Id.* This method of matching U.S. TRBs with home-market TRBs is referred to as the "greatest-single-deviation" methodology. Eventually, Commerce made a final determination on the dumping of TRBs.[7] *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan,* 52 Fed. Reg. 30700, 30701–02 (Dep't Comm. 1987) (final determination).

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[6] For example, if two home market TRBs had deviations of 6%, 5%, 5%, 5%, and 5%, and 7%, 4%, 4%, 4%, and 4% for the five criteria, respectively, the first TRB would be chosen as a match under this methodology because the greatest deviation of the first TRB (6%) is smaller than the greatest deviation of the second TRB (7%).

[7] *See* 19 U.S.C. § 1673d (1988); 19 C.F.R. § 353.20 (1995) (governing final determinations).

In March of 1989, Commerce initiated the first administrative review of TRBs from Japan covering the period from March 27, 1987, through September 30, 1988. *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 54 Fed. Reg. 9868 (Dep't Comm. 1989).[8] After initially using the greatest-single-deviation methodology previously described, Commerce changed to a "sum-of-the-deviations" methodology for matching U.S. TRBs with home-market TRBs. *See Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan,* 56 Fed. Reg. 41508, 41509 (Dep't Comm. 1991) (final admin. review). This methodology compared the matched TRBs in each of the five criteria without using any limitation or "cap" on the deviation of any one criteria, and chose as the best match the TRB model for which the sum of the deviations was the lowest. *Id.*

Koyo contended during the administrative review that without a ten percent cap on deviations for each of the five criteria, certain matches resulted in the comparison of products that look very different, have dissimilar components, construction, and capabilities, and are used by different customers for different purposes. *Id.* at 41510–11. Koyo contended that models used for different purposes are priced for sale in different markets, and therefore are not approximately equal in commercial value. *Id.* at 41511. Koyo also contended that TRB models with more than an insignificant deviation in any one or more of the critical criteria will not normally be considered commercially similar. *Id.* In short, Koyo argued that Commerce could only be assured of matching "such or similar" TRBs if it used the ten percent cap on each of the five criteria used in the sum-of-the-deviations methodology. Commerce rejected Koyo's contentions, and used the sum-of-the-deviations methodology, without a ten percent cap, to match TRBs. *Id.* Commerce found a dumping margin for Koyo TRBs of 36.2 percent *ad valorem.*

Koyo commenced suit in the Court of International Trade contesting the final results of the 1987–1988 administrative review. Among other things, Koyo argued that Commerce should have continued to use the greatest-single-deviation methodology it had used in the less-than-fair-value investigation that resulted in the final dumping determination. Koyo further contended that, with that methodology, Commerce should have used a ten percent cap. On September 21, 1993, the court ruled on Koyo's motion for judgment on the agency record. The court stated:

> Koyo concedes that both methodologies are capable of generating comparisons of such or similar merchandise; however, it further states that there is a limit on the permissible deviation of the criteria used to match TRB models and, therefore, Commerce should use the ten percent cap.
>
> Commerce claims that the ten percent cap is not necessary as it would eliminate from use as comparison models home market sales which overall are most similar to the United States TRBs.

[8] *See* 19 U.S.C. § 1675 (1988); 19 C.F.R. § 353.22 (1995) (governing administrative review of antidumping orders).

> This Court affirms Commerce's switch in methodologies; *nevertheless, the Court feels that the new methodology must be used in conjunction with the ten percent cap* to limit the permissible deviation of the criteria used to [match] TRB models. Commerce used the cap in its original less than fair value determination and its use avoids comparisons between products which differ so dramatically that they simply cannot be considered commercially similar.

Koyo, 834 F. Supp. at 435 (emphasis added). Accordingly, the court granted Koyo's motion in part, remanding the case to Commerce to apply the ten percent cap in conjunction with the sum-of-the-deviations methodology.

On remand, Commerce reapplied the sum-of-the-deviations methodology, while also excluding any home-market TRB that exceeded the U.S. model by more than ten percent in any of the five criteria. Commerce imposed a dumping margin of 30.19 percent *ad valorem.* Thereafter, the Court of International Trade entered a final order affirming Commerce's calculation, and dismissing the case. The government contests that portion of the court's September 21, 1993 judgment that requires Commerce to apply the ten percent cap in conjunction with the sum-of-the-deviations methodology.

DISCUSSION

I. *Standard of Review:*

The standard of review that the Court of International Trade applies to an antidumping duty determination is set forth in 19 U.S.C. § 1516a(b)(1)(B) (1988). *NEC Home Elecs., Ltd. v. United States,* 54 F.3d 736, 742 (Fed. Cir. 1995). That statute provides that the ITA's determination will be affirmed unless it is unsupported by substantial evidence or otherwise not in accordance with law. *Id.* "[T]o determine whether the Court of International Trade correctly applied [its] standard [of review] in reaching its decision, this court must apply anew the statute's express standard of review to the agency's determination." *Id.* (quoting *PPG Indus., Inc. v. United States,* 978 F.2d 1232, 1236 (Fed. Cir. 1992)). Thus, we must affirm the Court of International Trade if Commerce's final results in the 1987–1988 administrative review are unsupported by substantial evidence or otherwise not in accordance with law.

II. *Analysis:*

A

The facts are not in dispute. The sole issue in the case is whether Commerce's use of the sum-of-the-deviations methodology without a ten percent cap violates the statute. We begin our analysis with an examination of the relevant statutory provisions. *See VE Holding Corp. v. Johnson Gas Appliance Co.,* 917 F.2d 1574, 1579 (Fed. Cir. 1990) ("It is axiomatic that statutory interpretation begins with the language of the statute."), *cert. denied,* 499 U.S. 922 (1991). The statutory provision defining "such or similar" merchandise is silent with respect to the methodology that Commerce must use to match a U.S. product with a

suitable home-market product. *See* 19 U.S.C. § 1677(16) (1988). This is not surprising, given that the model-match methodology for comparing one type of product, such as TRBs, would not be relevant to the model-match methodology for other products, such as motorcycles or paint. Congress has not addressed in the statute the issue of how Commerce is to match U.S. TRBs with "such or similar" home-market TRBs.

B

Where Congress has not directly addressed the precise question at issue, a court "does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). Instead, under *Chevron,* "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* The parties dispute, as a threshold matter, whether *Chevron* applies to this case.

Koyo contends that *Chevron* does not apply, because Congress has not left a gap in the antidumping law for Commerce to fill. According to Koyo, the Court of International Trade properly concluded that the methodology chosen by Commerce for matching U.S. and home-market TRBs did not produce matches of "such or similar" merchandise on which to base the calculation of dumping margins, as required by 19 U.S.C. § 1677b. Koyo frames the precise question at issue as: "whether the U.S. and home market products actually compared by [Commerce] in this administrative review" meet the "such or similar" requirement of the U.S.C. § 1677b. Because statutory interpretation is a question of law that the court decides without deference to any agency interpretation, Koyo argues, *Chevron* does not apply.

The government responds that *Chevron* does apply, because the statute requiring Commerce to select and compare "such or similar" merchandise "does not detail the methodology that is to be used in determining what constitutes 'similar' merchandise." In the government's view, this means that Congress has granted Commerce "discretion to make policy decisions regarding which home market models are properly comparable with U.S. models" under the statute. According to the government, this implicit legislative delegation of authority invokes *Chevron,* and under *Chevron,* the court should have deferred to Commerce's reasonable choice of model-match methodologies.

We agree with the government that Congress has implicitly delegated authority to Commerce to determine and apply a model-match methodology necessary to yield "such or similar" merchandise under the statute. This Congressional delegation of authority empowers Commerce to choose the manner in which "such or similar" merchandise shall be selected. *Chevron* applies in such a situation. *See, e.g., Lasko Metal Prods., Inc. v. United States,* 43 F.3d 1442, 1446 (Fed. Cir. 1994) ("In situations in which a statute does not compel a single understanding, the Supreme Court and this court have held that 'our duty is not to weigh

the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute.'"); *Texas Crushed Stone Co. v. United States,* 35 F.3d 1535, 1541 (Fed. Cir. 1994) (Congress did not unambiguously express an intent as to the test used to determine whether there had been a concentration of dumped imports in a particular region, and consequently this court "must defer to the [International Trade Commission's] interpretation of the statutory provision in question * * * unless we find such interpretation to be unreasonable.").

We reject Koyo's contention that *Chevron* does not apply because the issue of whether merchandise matched by Commerce is "such or similar" under the statute is purely one of law. Under Koyo's approach, no court of first instance could ever accord *Chevron* deference to an agency determination made pursuant to an implicit delegation of authority under a statute, because the only issue would be a de novo review of whether the agency's determination complied with the governing statute. Although Koyo correctly argues that the court must determine whether the agency's interpretation ultimately complies with the statute, under *Chevron* that review is limited to whether "the agency's answer is based on a permissible construction of the statute," *Chevron,* 467 U.S. at 843, because an agency's statutory interpretation that is contrary to law is necessarily impermissible.

C

Under *Chevron,* in order to survive judicial scrutiny, an agency's construction need not be the only reasonable interpretation or the reading the court would have reached if the question initially had arisen in a judicial proceeding. *Chevron,* 467 U.S. at 843 n.11. In that regard, we have stated that the ITA is "the 'master' of antidumping law * * * [and its decisions are] worthy of considerable deference." *Daewoo Elecs. Co. v. United States,* 6 F.3d 1511, 1516 (1993), *cert. denied,* 114 S.Ct. 2672 (1994). Thus, our inquiry is limited to determining whether Commerce's model-match methodology, without the ten percent cap later required by the court, is reasonable. We conclude that it is.

Commerce's interpretation is reasonable because there is no evidence that any one of the five criteria should be decisive in determining whether to match a given U.S. TRB with a home-market TRB. By choosing not to apply the ten percent cap, Commerce in essence weights each of the five criteria equally, which is plainly reasonable.

Commerce's choice not to use the ten percent cap in connection with its sum-of-the-deviations methodology is also reasonable in view of the other safeguards used by Commerce to prevent matches of TRBs that are not "such or similar." For example, Commerce eliminated from its analysis any potential comparisons for which the difference in the variable costs between the home-market model and the target U.S. model exceeded twenty percent. 56 Fed. Reg. at 41509. Also, when the sum of the deviations was the same for two or more home-market models, Com-

merce compared the variable manufacturing costs for these models with the variable manufacturing costs for the U.S. model to select the most similar match. *Id.* Such analytical tools for matching TRBs, even in the absence of a ten percent cap on the individual criteria, render Commerce's model-match methodology reasonable.

Koyo argues that Commerce's interpretation is unreasonable because it results in the comparison of TRBs that are not commercially similar because they are used for very different purposes and sold in different markets. Koyo cites, as an example of this allegedly inequitable and statutorily improper result, Commerce's comparison of a U.S. model TRB "purchased by a major U.S. automobile company for use in the front wheel of a light truck, [which] is a comparatively high volume product sold in a very competitive market" with a Japanese TRB "typically used in heavy equipment such as an articulated off-highway wheel loader." We agree, however, with Commerce's view that, for purposes of calculating antidumping duties, it is not necessary "to ensure that home market models are technically substitutable, purchased by the same type of customers, or applied to the same end use as the U.S. model." 56 Fed. Reg. at 41511. It is not unreasonable for Commerce to view the described TRBs as "like * * * in the purposes for which used." 19 U.S.C. § 1677(16)(B)(ii), (C)(ii). Matching "such or similar" home-market merchandise with certain U.S. merchandise is all that the statute requires; Koyo has not shown that Commerce's matching methodology represents an impermissible approach under the statute.

For the foregoing reasons, the Court of International Trade's modification of Commerce's model-match methodology was improper. Under *Chevron,* the court was bound to defer to Commerce's permissible construction of the statute. *Chevron,* 467 U.S. at 843.

CONCLUSION

For the foregoing reasons, we reverse that portion of the September 21, 1993 judgment of the Court of International Trade requiring Commerce to impose a ten percent cap to each of the five criteria used to match U.S. TRBs with home-market TRBs. We affirm the remainder of the judgment. The case is remanded for further proceedings consistent with this opinion.

COSTS

Each party shall bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

CASIO, INC., PLAINTIFF/CROSS-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLANT

Appeal Nos. 95–1099 and 95–1111

(Decided January 16, 1996)

Steven P. Florsheim, Grunfeld, Desiderio, Lebowitz & Silverman, LLP, of New York, New York, argued for plaintiff/cross-appellant.

Susan Burnett Mansfield, Department of Justice, of New York, New York, argued for defendant-appellant. *Frank W. Hunger,* Assistant Attorney General, *David M. Cohen,* Director, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office and *John J. Mahon,* Attorney, Department of Justice, Commercial Litigation Branch, of New York, New York, were on the brief for defendant-appellant. Also on the brief was *Sheryl A. French,* Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of New York, New York, of counsel.

Appealed from: U.S. Court of International Trade.
Judge MUSGRAVE.

Before ARCHER, *Chief Judge,* MICHEL and SCHALL, *Circuit Judges.*

MICHEL, *Circuit Judge.*

The United States appeals the decision of the United States Court of International Trade, No. 89–07–00385, reclassifying 5 of 38 electronic musical synthesizer models, imported by Casio, Inc. ("Casio"), as "electrical articles which produce sound," Tariff Schedules of the United States ("TSUS")[1] 688.34, as opposed to their original classification as "electronic musical instruments," TSUS 725.47. Casio cross-appeals the court's determination that the remaining models of imported electronic musical synthesizers were properly classified as "electronic musical instruments." We affirm.

I. BACKGROUND

Casio imports into the United States electronic musical synthesizers.[2] All of the imported synthesizer models were classified by the Customs Service, upon entry into the United States, as "Electronic musical instruments: Other," TSUS 725.47, with a duty rate of 6.8% *ad valorem.*

Casio timely challenged the classification by filing suit in the United States Court of International Trade. Casio argued that these synthesizers were improperly classified as electronic musical instruments and should instead have been classified under TSUS 688.34 as "Electrical articles and electrical parts of articles, not specifically provided for: Electrical articles using pre-programmed digital integrated circuits to produce sound," dutiable at the rate of 3.9% *ad valorem.*

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[1] It appears the articles were classified under the TSUS and not the more recent Harmonized Tariff Schedules of the United States ("HTSUS") because the importations at issue occurred in 1987 and 1988, while the HTSUS did not supersede the TSUS until 1989. *See, e.g., Nidec Corp. v. United States,* 68 F.3d 1333, 1335 (Fed. Cir. 1995).

[2] At issue in this case are the following Casio models: CDP-3300, CPS-101, CPS-300, CT-360, CT-370, CT-450, CT-510, CT-607, CT-630, CT-640, CT-460, MT-640, EP-10, EP-20, EP-30, HT-3000, HT-6000, MT-140, MT-205, MT-240, MT-520, MT-540, MT-600, PMP-300, PMP-400, PMP-500, PT-10, PT-87, PT-180, SK-1, SK-5, SK-8, SK-10, VZ-1, VZ-10M, HZ-600, MG-510 and PG-380.

Each of the synthesizers at issue in this case includes at least one of the following features.

1. **ROM Pack**—computer chip driven device containing ROM (read only memory) programmed to play a melody on the keyboard or to guide in a teaching function *(e.g.,* to light indicator lights associated with a specific key).
2. **Sampling**—the ability to capture a sound *(e.g.,* a dog bark) and then play it back at different pitches *(e.g.,* "Jingle Bells" as done by barking dogs).
3. **Sequencer**—a device that remembers a sequence of key depressions, including note, duration, and sometimes pressure, and then plays it back. A multiple track sequencer allows additional sounds to be added on top of a previously recorded sequence. Using this function, a musician can record a background beat and additional musical phrases to the sequencer, and then play the melody on top.
4. **Auto-rhythm**—generates a rhythm selected from a number of pre-programmed rhythms *(e.g.,* country, reggae, samba, waltz, etc.). The musician can then play a melody over the generated rhythm.
5. **Auto-accompaniment**—automatically generates an accompaniment of "fill-in" notes for the keys depressed on the right side of the keyboard.
6. **Mixer**—A device that permits the adjustment of relative volumes of various functions, such as auto-rhythm and the keys being pressed by the musician.

Inasmuch as the imported articles contained substantial non-musical instrument functions and features, Casio claimed, the articles were "more than" electronic musical instruments and could not be classified as such.

In addition, Casio argued that five of the imported models, VZ–1, VZ–10M, HZ–600, MG–510 and PG–380, could not be classified as electronic musical instruments because they were imported and sold in commerce without an amplifier and speakers or headphones and thus did not make an audible sound as imported. The ability to make an audible sound, they argued, was a requirement for classification as an electronic musical instrument.

The trial court concluded that the Casio synthesizers were not "more than" electronic musical instruments, finding that "[t]he primary design and function of the features at issue appear to become part of and enhance the musical instruments in which they are found. The features that are part of the subject articles make playing the instruments easier." *Casio, Inc. v. United States,* No. 89–07–00385, slip op. at 11 (Ct. Int'l Trade Oct. 7, 1994). It did conclude, however, that the decision of one of our predecessor courts in *Montgomery Ward & Co., Inc. v. United States,* 499 F.2d 1283 (CCPA 1974), requires that an electronic musical instrument make a sound to be considered as such, and therefore, Casio synthesizer models imported without amplifier or speakers should be classified under TSUS 688.34.

II. Standard of Review

Proper classification of imported merchandise under an appropriate tariff provision "entails a two-step process of (1) ascertaining the proper meaning of specific terms within the tariff provision and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed. The first step is a question of law which we review *de novo* and the second is a question of fact which we review for clear error." *Marcel Watch Co. v. United States,* 11 F.3d 1054, 1056 (Fed. Cir. 1993) (citing *Stewart-Warner Corp. v. United States,* 748 F.2d 663, 664–65, 3 Fed. Cir. (T) 20, 22 (1984)). "The ultimate issue as to whether particular imported merchandise has been classified under an appropriate tariff provision is a question of law subject to *de novo* review," and the resolution of that ultimate issue involves the two-step process outlined above. *Marcel Watch,* 11 F.3d at 1056.

III. Electronic Synthesizers With Amplifiers and Speakers

The "electronic musical instrument" classification, under which the Customs Service classified all of Casio's electronic musical synthesizer models, is an *eo nomine* designation, *i.e.,* "one which describes [a] commodity by a specific name, usually one well known to commerce." *Black's Law Dictionary* 535 (6th ed. 1990). When an object "is in character or function something other than as described by a specific statutory provision—either more limited or more diversified—and the difference is significant, it cannot find classification within such *[eo nomine]* provision." *Robert Bosch Corp. v. United States,* 63 Cust. Ct. 96, 103–04 (1969). Casio argues that because each of the models of electronic musical synthesizers in question has at least one additional feature,[3] which is not a musical instrument feature, each is "more than" an electronic musical instrument and cannot be classified under TSUS 725.47.

Casio's argument, however, is unpersuasive. On the contrary, an article which has been improved or amplified but whose essential characteristic is preserved or only incidentally altered is not excluded from an unlimited *eo nomine* statutory designation. *Id. See also United Carr Fastener Corp. v. United States,* 54 CCPA 89, C.A.D. 913 (1967). The criterion is whether the item "possess[es] features *substantially in excess* of those within the common meaning of the term." *Id.* at 91 (emphasis added). Upon reviewing all of the evidence, including Casio's expert witnesses, the trial court determined that the Casio synthesizers were not "more than" musical instruments and found that the primary purpose of the additional features was to "enhance the musical instruments in which they [were] found" making the instruments easier to play with a greater variety of voices (sounds). *Casio,* slip op. at 11.

The trial court's finding that the synthesizers do not possess features substantially in excess of those within the common meaning of the term "electronic musical instruments" is not clearly erroneous. All of the

[3] Each model has one or more of the following features: ROM-Pack melody or teaching aids, sampling, effects device, sequencer, auto-rhythm, auto accompaniment and/or mixer.

additional features are designed primarily to make it easier for a musician to create music or embellish the sound he or she would normally be able to produce. The auto-rhythm and auto-accompaniment features allow inexperienced users to create chords and accompaniment with the press of a key, and the sequencer features allow a single musician to play, in essence, multiple instruments simultaneously. The only feature which does not appear to enhance a musician's ability to play the instrument is the one that plays prerecorded melodies. However, Casio admitted that this may be a musical instrument feature because it is similar in nature to a music box, which was specifically designated a musical instrument by Congress. TSUS 725.50.

IV. ELECTRONIC SYNTHESIZERS WITHOUT AMPLIFIERS AND SPEAKERS

Casio electronic synthesizer models VZ–1, VZ–10M, HZ–600, MG–510 and PG–380 do not contain amplifiers or speakers and therefore cannot be heard without either attaching the products to external amplifier/speaker systems *(e.g.*, a stereo system) or by plugging in a pair of headphones. Models VZ–1 and HZ–600 are high end model electronic keyboard synthesizers, and models MG–510 and PG–380 are guitar-like electronic synthesizers. In addition, model VZ–10M requires a controller *(e.g.*, a keyboard or other Musical Instrument Digital Interface compliant device) in order to operate.

In *Montgomery Ward*, the United States Court of Customs and Patent Appeals held that electronic organ components imported without an amplifier and speaker or a cabinet could not together be classified as an electronic musical instrument but were instead properly classifiable as electronic musical instrument parts. The court first looked to the definition of "electronic musical instruments" as defined in headnote 2(c), subpart A, part 3, schedule 7, TSUS:

> (c) the term "electronic musical instruments" embraces all musical instruments in which the sound is generated electrically, and conventional-type instruments not suitable for playing without electrical amplification, but the term does not include conventional- type instruments, fitted with electrical pickup and amplifying devices, when the instrument is suitable for playing without such amplification.

Although it was undisputed that the organ's sound was generated electrically, the court found that "[t]he imported components do not generate sound * * * they generate electric currents only. The speaker * * * acts as a transducer to convert electrical energy into sound. Until this occurs, there is no sound." *Montgomery Ward,* 499 F.2d at 1288. This led the court to hold as follows:

> We deem it essential to its classification as a "musical instrument"—in the absence of some indication of legislative intent to the contrary—that there be a capability in an organ of producing sound when played upon.

Id. The court further emphasized its position that audible sound was required for proper classification of an article as an electronic musical

instrument in a later section of the opinion discussing the adequacy of the assignment of error. The court stated that

> [a]ppellee has raised a question about the adequacy of the assignment of errors in the notice of appeal to this court to "preserve for review the issue of whether an unfinished electronic musical instrument must be capable of producing audible sound * * * in order to be classified as an electronic musical instrument for tariff purposes." It will be recognized that said issue goes to the very essence of this appeal.

Id. Thus, *Montgomery Ward* clearly establishes, as precedent, the proposition that "a capacity to produce the electronic sound at the time of importation is the *sine qua non* for classification of a musical instrument under item 725.47." *Universal Accordion Factory v. United States,* 73 Cust. Ct. 208 (1974).

This court has adopted as precedent the holdings of its predecessor courts, the United States Court of Claims and the United States Court of Customs and Patent Appeals, and may only overrule those prior holdings by sitting *in banc. South Corp. v. United States,* 690 F.2d 1368, 1370, 215 USPQ 657, 658 (Fed. Cir. 1982). Without a contrary, intervening decision of the United States Court of Customs and Patent Appeals or this court sitting *in banc,* we are bound by the pronouncement in *Montgomery Ward* and must conclude that the Casio synthesizer models that cannot make an audible sound as imported are not properly classified as electronic musical instruments under TSUS 725.47.

The government contends that the applicable law found in *Montgomery Ward* had been clarified by the subsequent decision in *Daisy-Heddon, Div. Victor Comptometer Corp. v. United States,* 600 F.2d 799 (CCPA 1979). In *Daisy-Heddon,* the court resolved and clarified the competing tariff provisions for unfinished articles and the various TSUS items pertaining to parts by holding that a substantially complete article, despite the omission of an essential part, is classifiable as an unfinished article as opposed to an article part. *Id.* at 802. The court set forth a number of factors to use in determining whether articles (in that case fishing reels) were substantially complete and thus properly classified as unfinished articles. *Id.* at 803. The government argues that, under the *Daisy-Heddon* factors, the Casio synthesizers are "substantially complete" electronic musical instruments and should be classified as such.

The government's reliance on *Daisy-Heddon* is misplaced. *Daisy-Heddon* sets forth a means of determining whether an article is properly classified as an unfinished article or an article part. The synthesizers at issue in this matter are neither unfinished articles nor article parts. Moreover, *Daisy-Heddon* does not speak to the specific proposition set forth in *Montgomery Ward* and determinative in this matter: that an article must make an audible sound as imported to be properly classified as an electronic musical instrument.

Alternatively, the government argues that the five synthesizers are properly classifiable as "Musical instrument parts not specifically pro-

vided for: Other," TSUS 726.90. The government points out that the court in *Montgomery Ward* classified the electronic organ components as parts of an electronic musical instrument even though, when assembled, they could not produce an audible sound. As opposed to the court in *Montgomery Ward,* we do not have musical instrument parts before us. As properly found by the trial court, these "articles as imported are complete articles of commerce and are sold to the public in their imported condition." *Casio,* slip op. at 13. Whereas the organ components in *Montgomery Ward* could appropriately be classified as musical instrument parts, the synthesizers at issue in this case cannot. Accordingly, the trial court properly reclassified the imported synthesizer models incapable of producing sound under TSUS 688.34.

CONCLUSION

The judgment of the Court of International trade as to the classification of all Casio electronic synthesizer models is

AFFIRMED

ZENITH ELECTRONICS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT-APPELLANT *v.* AOC INTERNATIONAL, INC., FULET ELECTRONIC INDUSTRIAL CO., LTD., SAMPO CORP., AND TATUNG CO., DEFENDANTS-APPELLEES, AND CAPETRONIC (BSR) LTD., DEFENDANT

Appeal No. 95–1139

(Decided February 12, 1996)

John K. Lapiana, Attorney, Department of Justice, of Washington, D.C., argued for defendant-appellant, The United States. *Frank W. Hunger,* Assistant Attorney General and *David M. Cohen,* Director, Commercial Litigation Branch, Department of Justice, of Washington, D.C., were on the brief for defendant-appellant. Of counsel was *Velta A. Melnbrencis.* Also on the brief was *Rebecca Rejtman,* Attorney-Advisor, Office of the General Counsel for Import Administration, U.S. Department of Commerce, of counsel.

Christopher M. Curran, White & Case, of Washington, D.C., argued for defendants-appellees, AOC International, Inc., Fulet Electronics Industrial Co., Ltd., Sampo Corp., and Tatung Co. *William J. Clinton, David E. Bond* and *Lisa L. Hubbard,* White & Case, of Washington, D.C., were on the brief for defendants-appellees.

Appealed from: U.S. Court of International Trade.
Judge WATSON.

Before MAYER, *Circuit Judge,* SKELTON, *Senior Circuit Judge,* and LOURIE, *Circuit Judge.*

MAYER, *Circuit Judge.*

The United States appeals the judgment of the United States Court of International Trade in *AOC Int'l, Inc. v. United States,* 721 F. Supp. 314

(Ct. Int'l Trade 1989), *aff'd after remand sub nom. Zenith Elecs. Corp. v. United States,* No. 94–170 (Ct. Int'l Trade Oct. 21, 1994), holding that the International Trade Administration of the United States Department of Commerce (Commerce), incorrectly calculated a circumstances-of-sale adjustment in determining antidumping duties to be imposed on color television receivers from Taiwan. Because the court did not defer to Commerce's reasonable interpretation and application of the statute at issue, we reverse and remand.

BACKGROUND

Under antidumping laws, Commerce is required to impose additional duties on imported products being sold, or likely to be sold, at less than their fair value, to the harm of a domestic industry. 19 U.S.C. § 1673 (1982).[1] The amount of such duties, known as the dumping margin, is equal to the "amount by which the foreign market value exceeds the United States price for the merchandise." *Id.* Commerce may calculate the United States price and the foreign market value on several alternative bases. United States price is calculated as either the United States "purchase price" or the "exporter's sales price," whichever is appropriate. *Id.* § 1677a (1982 & Supp. 1984); *see generally Sharp Corp. v. United States,* 63 F.3d 1092, 1093–94 (Fed. Cir. 1995); *Koyo Seiko Co. v. United States,* 36 F.3d 1565, 1567 (Fed. Cir. 1994) (generally, if "the domestic importer is unrelated to, and independent of, the foreign producer, purchase price is used," otherwise exporter's sales price is used). Foreign market value, on the other hand, is computed on the basis of home market sales, third country sales, or constructed value, as appropriate. 19 U.S.C. § 1677b (1982 & Supp. 1984); *see Smith-Corona Group v. United States,* 713 F.2d 1568, 1573 (Fed. Cir. 1983) (home market sales are preferred; however, in the absence of adequate sales, third country sales or constructed value may be used).

"To ensure that the quantum of antidumping duties is calculated in a fair manner, both foreign market value and United States price are subject to certain adjustments in order to achieve a common point at which to perform the price comparison." *Koyo Seiko,* 36 F.3d at 1568; *see also Torrington Co. v. United States,* 68 F.3d 1347, 1352–53 (Fed. Cir. 1995). After Commerce makes such adjustments, the two values are compared, and the amount by which foreign market value exceeds United States price is imposed as an additional antidumping duty. At issue in this appeal is Commerce's application of the "circumstances of sale" adjustment to foreign market value, set out at 19 U.S.C. § 1677b(a)(4)(B), in determining antidumping duties to be imposed on color television receivers from Taiwan.

In 1984 Commerce published an antidumping duty order on color television receivers, other than video monitors, from Taiwan. Color

[1] Congress recently amended the antidumping laws. *See* Uruguay Round Agreements Act (URAA), Pub. L. No. 103–465, tit. II, 108 Stat. 4809 (1994); *see also Sharp Corp. v. United States,* 63 F.3d 1092, 1093 n.1 (Fed. Cir. 1995). These amendments, however, do not apply to administrative reviews initiated before January 1, 1995. *See Torrington Co. v. United States,* 68 F.3d 1347, 1352 (Fed. Cir. 1995). Accordingly, we use the antidumping laws in effect during the period in question. For simplicity, we speak in the present tense when referring to these statutes.

Television Receivers, other than Video Monitors, from Taiwan, 49 Fed. Reg. 18,337 (Dep't Comm. 1984) (final determination). Thereafter, it published the final results of its first administrative review of that order, covering the period October 19, 1983, through March 31, 1985. Color Television Receivers, other than Video Monitors, from Taiwan, 51 Fed. Reg. 46,895 (Dep't Comm. 1986) (final admin. review). In determining the dumping margins for that period, Commerce allowed the claims of AOC International, Inc.; Fulet Electronic Industrial Co., Ltd.; and Sampo Corp.[2] (collectively "the CTV companies") for circumstances-of-sale adjustments to their respective foreign market values,[3] to account for differences between warranty expenses in their home market and those in the United States.[4] *Id.* at 46,898–900. However, Commerce limited the adjustments to the cost of parts used in performing the warranty repairs. It denied the CTV companies' claims for adjustments for the salaries and benefits they paid to in-house technicians who serviced the warranties. *See id.* (comments 11, 22, and 25). Commerce determined that the salaries and benefits of in-house warranty service personnel are indirect selling expenses that would have been incurred regardless of the sales under consideration. *See, e.g., id.* at 46,898 (comment 11). Consequently, it concluded that the CTV companies were not entitled to an adjustment for those expenses under section 1677b(a)(4)(B).

By contrast, in adjusting the United States prices of the CTV companies for warranty expenses, Commerce included the cost of labor incurred in servicing warranties through outside contractors. Color Television Receivers, other than Video Monitors, from Taiwan, 51 Fed. Reg. 37,317 (Dep't Comm. 1986) (prelim. admin. review); *AOC Int'l*, 721 F. Supp. at 316. As a result, the adjustments for warranty expenses in the United States exceeded those in the home market, resulting in corresponding increases in the CTV companies' dumping margins. 721 F. Supp. at 316.

The CTV companies filed suit in the Court of International Trade, alleging that Commerce had abused its discretion in limiting the circumstances-of-sale adjustments to the cost of parts used in servicing the warranties. The CTV companies argued that all warranty-related costs are directly-related selling expenses subject to adjustment, including in-house labor costs in the home market. In response, the United States argued that "the overall eligibility of warranty expenses for an adjustment as directly-related selling expense [sic] does not *per se* qualify every component of warranty expenses to be included" in the adjustment. *Id.* Rather, each component of an adjustment must independently qualify as a directly-related selling expense.

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[2] Tatung Co. did not participate in the issue that is the subject of this appeal before the trial court or here.

[3] In calculating foreign market value, Commerce used "home market price, third-country price, or constructed value, * * * as appropriate." Color Television Receivers, other than Video Monitors, from Taiwan, 51 Fed. Reg. 37,317 (Dep't Comm. 1986) (prelim. admin. review). With respect to the United States prices, Commerce used both purchase price and exporter's sales price, as appropriate. *Id.*

[4] The CTV companies offered longer warranty terms in connection with television sales in the foreign market than in the United States.

The Court of International Trade agreed with the CTV companies. In granting the companies' motion for judgment on the administrative record, it held that there is no requirement in statute or regulation that "each individual component of a directly-related selling expense" independently qualify as such. *Id.* at 317. The court said that in-house labor costs incurred in servicing warranty repairs are not "fixed" costs incurred regardless of the sales under consideration. *Id.* at 316. Therefore, it remanded the case to Commerce for reconsideration. The court subsequently affirmed the remand results, *Zenith Elecs. Corp.*, No. 94–170, and this appeal followed.

Commerce argues that the Court of International Trade "erred in concluding that Commerce must accept all identifiable and quantifiable cost components contained in a claimed adjustment—regardless of whether all such components affect price." It claims that such an approach "is baldly at odds" with statutory and regulatory requirements, as well as legislative history and its longstanding practice that only costs directly related to the sales under consideration be included in the adjustment. Commerce also contends that the court was wrong in substituting its conclusion that in-house warranty labor expenses are direct expenses for Commerce's determination that they are not.

DISCUSSION

The two issues before us are: whether the Court of International Trade erred in concluding that Commerce must include all cost components comprising a claimed circumstances-of-sale adjustment in making such an adjustment; and whether the court erred in holding that in-house warranty labor costs are direct expenses, and must be included in any such adjustment. On the first issue, we decide the proper interpretation of the governing statutes *de novo*. *Koyo Seiko*, 36 F.3d at 1570. We are guided, however, by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which says:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842 (footnotes omitted). Consequently, if there is no unambiguously expressed congressional intent, we must interpret the statute with deference to Commerce's interpretation, not that of the Court of International Trade. *See Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1516 (Fed. Cir. 1993). "To survive judicial scrutiny, [Commerce's]

construction need not be the *only* reasonable interpretation or even the *most* reasonable interpretation * * *. Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko,* 36 F.3d at 1570 (citing *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450 (1978)). "These tenets extend to their limits" when Commerce interprets the antidumping laws, for it is the "master" of those laws, and its interpretations are "worthy of considerable deference." *Daewoo Elecs.,* 6 F.3d at 1516.

With respect to the second issue, Commerce's administrative review determinations must be sustained "unless they are unsupported by substantial evidence on the record, or are otherwise not in accordance with law." *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1189 (Fed. Cir. 1990). Substantial evidence "'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197 (1938)).

In examining the language of the statute and the legislative history, we see no unambiguously expressed congressional intention that in making a circumstances-of-sale adjustment, Commerce must include all cost components of the specific circumstance on which the adjustment is based. We believe Commerce's interpretation of the circumstances-of-sale provision is reasonable, and its application of that interpretation here is in accordance with law and supported by substantial evidence.

A

We begin with an examination of the language of the statute itself. *Greyhound Corp. v. Mt. Hood Stages, Inc.,* 437 U.S. 322, 330 (1978). In pertinent part, the provision governing adjustments to foreign market value states: "In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to * * * other differences in circumstances of sale; * * * then due allowance shall be made therefor." 19 U.S.C. § 1677b(a)(4) (1982).[5] It is apparent that the "statute provides no specific guidelines for the treatment of warranty expenses." *Zenith Elecs. Corp. v. United States,* 988 F.2d 1573, 1583 (Fed. Cir. 1993). Nor does it establish any framework for Commerce to use in determining what "allowance" is "due" when making a circumstances-of-sale adjustment. Rather, in the context of this case, the statute provides only that if there is a difference between United States price and foreign market value, and if Commerce is satisfied that at least part of that difference is due to a difference between the warranty terms offered in Taiwan and those offered in the United States, then it shall make "due allowance therefor."

[5] Congress amended section 1677b in the URAA. *See supra* note 1. Generally, it replaced the concept of "foreign market value" with "normal value." *See* 19 U.S.C. § 1677b (1994). However, the circumstances-of-sale adjustment provision remains largely unchanged. *Id.* § 1677b(a)(6)(C)(iii).

We do not read this provision as either mandating or prohibiting Commerce's analysis of the individual cost components of a claimed adjustment to determine whether the difference between foreign market value and United States price is due at all to such components. Section 1677b(a)(4) "does not expressly limit the exercise of the Secretary's authority to determine adjustments, nor does it include the precise standards or guidelines to govern the exercise of that authority." *Smith-Corona Group v. United States,* 713 F.2d 1568, 1575 (Fed. Cir. 1983). Indeed, the statute does not "prescribe any method for determining allowances. Congress has deferred to the Secretary's expertise in this matter." *Id.* Thus, "[a]bsent a specific provision forbidding" Commerce from analyzing each cost component of a claimed circumstances-of-sale adjustment, "we cannot say that the express language of the statute clearly invalidates" its practice of doing so. *Id.* at 1576.

Nor does the legislative history reflect any congressional intent that would be dispositive. The circumstances-of-sale provision was enacted in 1958. Act of Aug. 14, 1958, Pub. L. No. 85–630, § 2, 72 Stat. 583; *see also Koyo Seiko,* 36 F.3d at 1572. The Senate Report on that act says only that the provision "is designed to facilitate efficient and fair comparison between foreign market value and price to the United States market," offering "differences in terms of sale" as an example of a differing circumstance for which an adjustment could be made. S. Rep. No. 1619, 85th Cong., 2d Sess., *reprinted in* 1958 U.S.C.C.A.N. 3498, 3504.

Similarly silent on the precise issue before us, yet helpful in resolving this case, is the legislative history on the Trade Agreements Act of 1979, Pub. L. No. 96–39, 93 Stat. 144, which created a comprehensive antidumping statute and approved the trade agreements negotiated in the Tokyo Round of Multilateral Trade Negotiations. *See Torrington Co. v. United States,* 44 F.3d 1572, 1580 (Fed Cir. 1995). The House Report explains that:

> Regulations will establish groups of adjustments based on types of adjustments currently recognized, that is, differences in circumstances of sale (e.g * * *. warranties, * * *) * * *.
>
> Such adjustments to the price of similar merchandise sold in the exporter's home market or third country markets are appropriate in determining FMV. However, if adjustments are improperly made, the result may be an unjustifiable reduction in or elimination of the dumping margin. Therefore, the Committee intends that adjustments should be permitted if they are reasonably identifiable, quantifiable, *and directly related to the sales under consideration* and if there is clear and reasonable evidence of their existence and amount.

H.R. Rep. No. 317, 96th Cong., 1st Sess. 76 (1979) (emphasis added). The quoted language indicates "not merely legislative acquiescence, but affirmative approval of what was, even in 1979, a *longstanding practice* of limiting deductions for differences in circumstances of sale to direct

expenses."[6] *Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1038 (Fed. Cir. 1985) (emphasis added); *see also Sharp Corp.*, 63 F.3d at 1094; *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* 13 F.3d 398, 400 (Fed. Cir. 1994) (reaffirming *Consumer Products*' holding that circumstances-of-sale adjustments shall only be made for direct expenses). Direct expenses are "expenses which vary with the quantity sold," while indirect expenses "are those that do not vary with the quantity sold." *Koyo Seiko,* 36 F.3d at 1569 n. 4; *see also Torrington Co.*, 44 F.3d at 1579; *Consumer Prods.*, 753 F.2d at 1035.

Because Commerce found that warranty terms in the home market differ from those offered in the United States, and that such differences wholly or partly account for the differences between the United States prices and foreign market values of the televisions, it was required to make "due allowance therefor." Neither the statute nor the legislative history, however, told it how to determine what allowance is "due." Congress has left that to Commerce's "broad discretion," guided by the limitation that circumstances-of-sale adjustments be made only for direct expenses. *See Smith-Corona,* 713 F.2d at 1576. Consequently, we examine the reasonableness of its interpretation and application of section 1677b(a)(4)(B).

B

An agency's interpretation of a statute is entitled to deference where neither its express language nor the legislative history tells how Congress intended an issue to be decided. *See Ad Hoc Comm.*, 13 F.3d at 402 ("Under *Chevron,* * * * courts do not consider the reasonableness of an agency's interpretation of a statute unless the relevant statute is silent or ambiguous on the question at hand."); *Suramerica de Aleaciones Laminadas, C.A. v. United States,* 966 F.2d 660, 667 (Fed. Cir. 1992). Hence, we must "defer to [Commerce's] interpretation of its own statute as long as that interpretation is reasonable." *Koyo Seiko,* 36 F.3d at 1573.

Under Commerce's interpretation of section 1677b(a)(4)(B), a respondent in an antidumping proceeding must establish that each cost component of a claimed circumstances-of-sale adjustment for differing warranty terms independently qualifies as a directly-related expense. This interpretation is consonant with Congress' intent that circumstances-of-sale adjustments only be permitted if they are directly related to the sales under consideration. It comports further with our understanding of section 1677b(a)(4)(B) as only allowing adjustments for "direct expenses." Indeed, Commerce's practice of limiting such deductions to direct expenses, of which Congress has approved, is "longstanding," dating back to 1960. *Consumer Prods.,* 753 F.2d at 1037–38.

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[6] Commerce's regulations allow indirect expenses to be deducted from foreign market value if the United States price is based on the exporter's sales price. 19 C.F.R. § 353.15(c) (1985) (currently codified at 19 C.F.R. § 353.56(b)(2) (1995)); *see also Torrington Co.*, 68 F.3d at 1353. Such an adjustment is denoted an "ESP offset" and is not at issue here.

Moreover, the purpose underlying the Treasury Department's[7] 1960 revision of the antidumping regulations is telling. By limiting adjustments to direct expenses, the government was attempting to curb abuses of the circumstances-of-sale provision enacted just two years earlier. *Id.* at 1038. "Foreign producers had claimed indirect expense deductions under the rubric of 'differences in circumstances of sale' to the point where price disparity routinely disappeared." *Id.* Examples of such abuses include foreign producers "claiming deductions for *salesmen's salaries,* * * * and for any other portions of their general expenses—*salaries,* * * * and so forth—which could be considered part of the sales, as distinguished from the production effort." *Id.* (emphasis added) (quoting Hendrick, *The United States Antidumping Act,* 58 Am. J. of Int'l L. 914, 922–23 (1964)).

Commerce's interpretation of section 1677b(a)(4)(B) protects against precisely these types of abuses. When a foreign producer claims an adjustment for a particular circumstance of sale, such as warranties, identified by Commerce as a category for which a reasonable allowance will generally be made,[8] the producer might include therein many disparate expenses that differ in both nature and the manner in which they were incurred. Not all of these expenses necessarily impact the difference between foreign market value and United States price. If Commerce were not permitted to analyze each cost component to determine its effect on such differential, unscrupulous foreign producers would be able to artificially reduce dumping margins by including indirect expenses in claimed adjustments.[9] This is precisely the result that the government sought to avoid in revising its antidumping regulations in 1960. It is also a result against which Congress cautioned in 1979. We conclude that it is eminently reasonable for Commerce to analyze the potentially myriad cost components of a claimed circumstances-of-sale adjustment to determine whether each component is a "direct expense," in determining what allowance is "due" or "reasonable."

We reject the CTV companies' argument that the antidumping regulations, 19 C.F.R. § 353.15, require that Commerce make adjustments for differences in warranty terms and that such adjustments must include all of the costs of such differences to the seller. Section 353.15(a) limits circumstances of sale for which a "reasonable allowance" will be made to circumstances that "bear a direct relation to the sales which are under consideration," or direct expenses. Commerce has identified "warranties" as an "example" of a difference in the circumstances of

[7] Treasury was the administering authority of the antidumping laws at that time.

[8] *See* 19 C.F.R. § 353.15(b) (1985).

[9] Indeed, while the trial court held, and the CTV companies argue, that Commerce must accept all elements of a respondent's claimed adjustment once it has concluded that the circumstance of sale is a directly-related selling expense, the CTV companies themselves recognized that certain cost elements would be inappropriately included in such an adjustment. They point out that they did not include any overhead of the warranty departments, such as factory space or the cost of repair machinery, in their claimed adjustments. Under their interpretation, however, had they included such costs, Commerce would be powerless to analyze the relation of those costs to the difference between foreign market value and United States price, or decline to include such costs in adjustments. Thus, their own recognition that not all costs associated with a circumstance of sale recognized in regulation as bearing a direct relationship to price are appropriate for inclusion in an adjustment undermines their interpretation of the statute and regulation.

sale for which a "reasonable allowance" will "generally" be made. *Id.* § 353.15(b). "Reasonable allowance," like "due allowance" in section 1677b(a)(4), is not defined, but in making the adjustment, Commerce "will be guided primarily by the cost of such differences to the seller." *Id.* § 353.15(d).

Commerce does not interpret section 353.15 as prohibiting an examination of the cost components of a claimed circumstances-of-sale adjustment. "In determining the meaning of an unclear regulation, the agency's own interpretation is entitled to deference." *Sharp Corp.*, 63 F.3d at 1095. Indeed, "the administrative interpretation is afforded 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* at 1096 (quoting *INS v. Stanisic,* 395 U.S. 62, 71 (1969)). Commerce's interpretation is neither.

Section 353.15(b) only identifies "warranties" as an "example" of a circumstance for which an adjustment will "generally" be made. This language is a far cry from an unqualified mandate that Commerce include all cost components identified by a foreign manufacturer as a warranty expense. Here, Commerce made an adjustment for differences in warranties. The adjustment was simply not agreeable to the CTV companies. In light of its broad discretion, it cannot be said that Commerce's actions are plainly erroneous or inconsistent with this provision.

Nor do we deem the regulation's direction that Commerce be guided primarily by the cost of differences to the seller in calculating the adjustment to be a requirement that Commerce include all cost components. Section 353.15(d) simply "allows [Commerce] to compute allowances for differences in the circumstances of sale on the basis of *cost,*" as opposed to the effect of such differences on market value. *See Smith-Corona,* 713 F.2d at 1574. This administrative preference is a matter of practicality, for "cost data * * * can be employed without [the] extensive econometric analysis" that would be required to determine the effect of differences in circumstances of sale on market value. *Id.* at 1577 n. 27. Thus, section 353.15(d) permits "cost" to the seller to be a guide to Commerce in quantifying what allowance is "due" or "reasonable." It does not require that Commerce include each cost component designated by the CTV companies as a warranty expense in any adjustment. Thus, we do not find Commerce's interpretation to be in conflict with this provision.

C

The final inquiry is whether the court erred in concluding that the CTV companies' in-house warranty labor costs were not "fixed." Commerce has explained that it does not include all cost components that could be grouped under the term "warranties" in circumstances-of-sale adjustments. *See* U.S. Department of Commerce, *Study of Antidumping Methodology and Recommendations for Statutory Change* (1985). Instead, it allows, "as direct selling expenses, the cost of free parts supplied * * * in servicing" warranties, as well as other direct expenses such

as travel and hotel expenses, and "payments to unrelated firms for performing servicing." *Id.* at 45. On the other hand, it does not include "indirect warranty expenses," such as a "serviceman's wages." *Id.* at 46. Consistent with this practice, Commerce here treated parts and payments to unrelated servicing firms as "direct expenses" for which it made adjustments, and in-house "serviceman's wages" as indirect expenses for which it declined to make adjustment.

Notwithstanding, the CTV companies argue that Commerce was wrong to conclude that their in-house warranty labor expenses were indirect expenses because they vary with the terms of the sales under consideration. That, however, is not dispositive. The test is whether the companies' in-house warranty labor expenses varied with the quantity of televisions sold. The CTV companies rejoin their in-house labor expenses do. The evidence upon which they rely, however, betrays the assertion.

The companies point to a spreadsheet in the record containing AOC's monthly home market warranty expenses for the period of December 1983 to December 1984, divided between salaries and benefits paid to in-house warranty service personnel and several other categories. The spreadsheet also shows the home market sales for that period, and reflects several months in which sales increased, yet the salaries and benefits paid to in-house warranty servicing personnel decreased, and vice versa. The same holds true even assuming it takes a month for the impact of an increase or decrease in sales volume to be reflected in the salaries and benefits paid to in-house warranty service personnel. Thus, while the salaries and benefits did vary, the record does not show that they "varied from month to month in accordance with the quantity of the product sold." Therefore, we accept Commerce's determination that the in-house warranty labor expenses at issue were not direct expenses.

Conclusion

Accordingly, the judgment of the Court of International Trade is reversed and the case is remanded for recalculation of dumping margins in a manner consistent with this opinion.

Costs

All parties shall bear their own costs.

REVERSED AND REMANDED

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